State of Maine
ONE HUNDRED AND TWENTY-FOURTH LEGISLATURE
COMMITTEE ON JUDICIARY

February 2, 2010

TO: Hon. Elizabeth Mitchell, President
Maine State Senate

Hon. Hannah Pingree, Speaker
Maine House of Representatives

FROM: Senator Lawrence Bliss, Senate Chair
Representative Charles R. Priest, House Chair CRP
Joint Standing Committee on Judiciary

Re: Report on Public Law 2009, chapter 230

We are pleased to present to you our report on the Judiciary Committee's review of Public Law 2009, chapter 230, An Act To Prevent Predatory Marketing Practices against Minors. This report describes the testimony provided to the Judiciary Committee during the hearing on October 15, 2009, including the discussion of the Constitutional and other legal issues raised in the lawsuit challenging the law. The report references articles and studies mentioned in the testimony provided to the Committee. Our findings and recommendations contain important legal and practical factors for future discussions and legislation.

We hope this report will be helpful to the Legislature as it works through the issues raised by PL 2009, c 230.

Thank you.

c: Business, Research and Economic Development Committee

STATE OF MAINE
124th LEGISLATURE
SECOND REGULAR SESSION

Report of the JOINT STANDING COMMITTEE ON JUDICIARY:

Review of Public Law 2009, Chapter 230

February 2010

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Executive Summary

Public Law 2009, chapter 230, An Act to Prevent Predatory Marketing against Minors, was challenged by the Maine Independent Colleges Association, the Maine Press Association, NetChoice and Reed Elsevier Inc. in the Federal District Court for the District of Maine. The complaint sought a declaratory judgment that Public Law 2009, chapter 230: (1) violates the First Amendment of the United States Constitution; (2) violates the Dormant Commerce Clause of the United States Constitution; and (3) is preempted by the Children's Online Privacy Protection Act (COPPA) (codified at 15 U.S.C. § 6501 et seq.). The Plaintiffs also sought preliminary and permanent injunctive relief prohibiting enforcement of Chapter 230. Attorney General Janet T. Mills expressed her concerns about the constitutionality of the law, and agreed not to enforce the law.

Senate President Elizabeth H. Mitchell issued a press release on August 28, 2009, explaining that she and Speaker of the House Hannah Pingree were requesting the Legislature's Judiciary Committee to meet and review questions that have been raised about LD 1183, set to take effect in September.

On September 9, 2009, Judge John A Woodcock, Jr., Chief United States District Judge, entered a stipulated order of dismissal of the litigation. In the order, the Court found that the Plaintiffs had met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment. The order indicated that the Attorney General acknowledged her concerns over the substantial overbreadth of the statute and the implications of Chapter 230 on the exercise of First Amendment rights and accordingly had committed not to enforce it. The order also included Attorney General Mills' representation that the Legislature will be reconsidering the statute when it reconvenes. Judge Woodcock put third parties on notice that a private cause of action under Chapter 230 could suffer from the same constitutional infirmities.

President Mitchell and Speaker Pingree followed the District Court's order with specific authorization for the Judiciary Committee to meet for two days in October 2009 for the purpose of reviewing questions that have been raised about Public Law 2009, chapter 230. Senator Lawrence Bliss and Representative Charles Priest scheduled the Judiciary Committee meetings for October 15th and 16th, and invited written testimony to be submitted by October 8th. The Judiciary Committee established a webpage to which all the submissions as well as announcements and legal documents were posted.
http://www.maine.gov/legis/opla/judcommreview.htm.

This report summarizes the testimony presented and the Judiciary Committee's discussion. The Judiciary Committee made Findings and Recommendations. The Committee members hope that the information will be useful in addressing predatory marketing issues as the Legislature moves forward.

I. INTRODUCTION

The Joint Standing Committee on Judiciary submits this report to Maine Senate President Elizabeth H. Mitchell and Maine House Speaker Hannah Pingree in response to their request to review the issues raised in a federal lawsuit challenging the constitutionality of newly enacted Public Law 2009, chapter 230, An Act to Prevent Predatory Marketing against Minors. Plaintiffs alleged that the new law violates the First Amendment, violates the Dormant Commerce Clause and is preempted by federal law. Maine Attorney General Janet T. Mills, citing her own concerns about the law's constitutionality, agreed not to enforce chapter 230 and asked that the lawsuit be dismissed, pointing out the promise of review by the Maine Legislature. The fact that the Legislature will be reviewing the law in the upcoming Second Regular Session of the 124th Legislature was noted by the Federal Judge Woodcock in his order dismissing the lawsuit.

The members of the Judiciary Committee hope this report is helpful in the Legislature's review and ultimate disposition of chapter 230.

All materials mentioned as received by the Judiciary Committee are available on the Judiciary Committee's webpage as either PDF documents or links to the materials or information available from a different website. The webpage, created solely for this review and reporting process, is: http://www.maine.gov/legis/opla/judcommreview.htm. The Committee thanks Darlene Shores Lynch, Senior Legislative Researcher in the Legislature's Office of Policy and Legal Analysis for her ceaseless work in developing and maintaining the webpage.

II. BACKGROUND

- LD 1183

LD 1183, Committee Amendment "A" to LD 1183 and Public Law 2009, chapter 230 are included as Appendix A.

During the First Regular Session of the 124th Maine Legislature, Senator Elizabeth M. Schneider (District 30) introduced LD 1183, An Act To Prevent Predatory Marketing Practices against Minors Regarding Data Concerning Health Care Issues. The bill addressed the current practices of persons using the Internet and other wireless communications devices, with or without promotional incentives, to acquire health-related information about minors and then using that information unscrupulously. The bill proposed to make it unlawful to solicit or collect health-related information about a minor who is not emancipated without the express written consent of the minor's parent or guardian, to transfer any health-related information that identifies a minor or to use any of that information to market a product or service to a minor regardless of whether or not the information was lawfully obtained. The bill defined unlawful marketing to include promoting a course of action relating to a product. The bill provided three potential remedies for a violation: relief as an unfair trade practice, a private right of action and a civil violation with substantial monetary fines.

Senator Schneider submitted written testimony identifying the multitude of technologies and applications, which are tools in communicating daily with one another, as presenting some dangers, especially for minors. She described the Internet as posing a dangerous minefield riddled with cyberbullying, harassment, predators, exploitation, data theft and even a potential path to abduction or worse. She proposed LD 1183 as a vehicle to address what she described as an ever increasing, diabolical practice of targeting minors to extract sensitive personal information from them. Unsuspecting minors are lured to click onto specific websites with a promise of music downloads, iPods, pizza and other giveaways, and asked to fill out surveys. She said that in exchange for trinkets, young people everyday open the door to strangers, allowing them to have the most in-depth information about their lives, not understanding the long-term repercussions of their actions. Marketers use and sell this data. Senator Schneider asserted that myriad products are pushed onto young Internet visitors: all sorts of drugs, acne medications, dieting pills, even erectile dysfunction medications. She testified that the data collected from minors can end up in the hands of anyone interested in paying for it. This potentially sensitive information will not disappear; she asserted that it could follow our youth to adulthood, creating problems for them with employers and perhaps in obtaining insurance. She believes that LD 1183 could have a positive impact on the problem.

Representative Anne Perry, a cosponsor of the bill, testified in favor of LD 1183; she did not provide written testimony.

Representative Sharon Anglin Treat cosponsored LD 1183 and submitted written testimony that included attachments on: 1) Accutane warnings and lawsuit; 2) "A Generation Unplugged" research report from HarrisInteractive dated September 12, 2008; 3) information from the website "YPulse Research: Research about generation Y for Media and Marketing

Progessionals;" 4) Marketing to Teens: Social Networking; 5) Articles and excerpts from BusinessWeek, "Marketing to Teens Online," dated November 7, 2007; LATimes, "Advertisers in touch with teens' cellphones, dated May 23, 2008; "Marketing Drugs to Teens Online - So Wrong!," dated February 20, 2007; Self Help Magazine, "Internet Marketing through Facebook: Influencing Body Image in Teens and Young Adults," dated 10/6/08; The Washington Post, "What Teens Are Hearing About Drugs," dated September 9, 2008. Representative Treat testified that marketing pharmaceuticals is big business, and kids are the next frontier. She cited information about the growing spending on direct-to-consumer (DTC) marketing; the $2.5 billion figure does not include Internet ads, social networking or text messaging. She asserted that drug companies should not directly market to minors. Marketing to kids, she said, exacerbates the problem that already exists with deceptive advertising that fails to accurately report on risks as well as benefits, by targeting vulnerable children who have even less capacity to seek out or evaluate information, plus it raises serious questions of privacy as information is collected from children and used to target marketing campaigns. Representative Treat claimed that marketing aimed at teens can be devastatingly effective, referring to children's vulnerabilities with regard to marketing that targets their feelings about body image and social position. She cited a study (included in her attachments) that showed that minors browse on the web on their phones, and ads are now appearing on mobile phones. Representative Treat said the use of this media for marketing drugs to children is not speculation; drug companies are actively courting minors through a variety of advertising media. She cited the story reported by the Washington Post about the marketing of acne drugs and birth control pills using back-to-school campaigns playing on teens' self-consciousness about acne, offering gift cards to Starbucks, providing chances of winning video games and computers, producing commercials featuring popular music groups, running advertisements on ABC Family, in movie theaters and in teen-girl clothing chain catalogs. Representative Treat cited sources that identify social networking sites, such as MySpace and Facebook, to reach teenagers online. She asserted that these marketing practices raise serious privacy issues. She pointed out the Business Week opinion piece that stated that advertisers can now target underage consumers with relative ease, raising obvious ethical questions. She noted that regulation is lacking; there are not specific FDA rules for marketing to kids and teens. COPPA is the only law that regulates online marketing to children under 13, but there is no law that governs marketing to older teens. Representative Treat said Maine needs to fill that void, and LD 1183 will do so. She cited Maine's history of protecting kids from predatory marketing tactics by the alcohol and tobacco industries. She said the marketing of prescription drugs raises equally serious issues with respect to health and safety threats to minors, and she urged passage of LD 1183.

Representative Leila Percy testified in favor of the bill; she did not provide written testimony.

Representative Stacy T. Dostie submitted written testimony in favor of LD 1183. She asserted that marketers flood our children with an estimated 40,000 ads a day. To allow them to target our children about nutrition or health issues is disastrous. Children are easily convinced, she said, giving the evidence of her 13 year old son who is constantly telling the family what they "need" to purchase according to what he sees on TV or Internet ads. She urged passage of the bill as a way to protect the children of this State.

Representative Charles "Ken" Theriault provided written testimony in support of LD 1183. He referred to the important information provided by Representative Treat about the dangers and privacy issues that have arisen because of the marketing practices the bill targets.

Ann Woloson submitted written testimony that included attachments showing Internet pages about "Easypod," a growth hormone therapy delivery device, and Differin, an acne medication; both sites seek personal information from teens. Ms. Woloson testified in favor of LD 1183; she is a mother of two teenage girls and works with a nonprofit public policy organization with the goal of improving access to affordable medicine in the United States. She said as a parent she is concerned about the host of marketing strategies targeted to minors including the gathering and sharing or selling of personal information to market or sell products or services, including credit cards. As a health care policy analyst, she said she is particularly concerned about the marketing practices used by the pharmaceutical industry to market its products to kids. She cited information about the industry's greater focus on broadening e-marketing efforts. Ms. Woloson pointed out the website www.coollearings.com sponsored by a growth hormone manufacturer that offered kids free MP3 downloads for answering a quiz correctly. She also cited online patient compliance programs as being described in the trade journals as a mechanism for boosting sales and directing consumers toward specific pharmaceutical products by offering consumers rewards as incentives. Ms. Woloson said she supported the proposed legislation as it will help protect minors from the unintentional consequences of sharing personal health care related information over the Internet. She suggested strengthening the bill by amending it to also include the unlawful collection or use of personal identifiable information, such as a minor's name, address, date of birth and Social Security Number.

Dr. Benjamin M. Shaefer, M.D. submitted written testimony in favor of LD 1183. He is a practicing cardiologist in Bangor and a board member of a physician group, the National Physicians Alliance, that advocates for patient's interest and the restoration of integrity in medicine. Dr. Schaefer asserted that children are the most vulnerable members of our society and they are increasingly exposed to marketing not only through "conventional" media such as television, but also through "social" electronic media such as Facebook, Twitter and similar vehicles. He said predatory marketing to children through traditional media has been recognized for a long time. Much of it has focused on marketing of alcohol, tobacco products and junk food. As a new user of Facebook, Dr. Shaefer said he was amazed to learn the site can deliver ads with clinical precision, and can specifically target high school students. He included a cite to an article in the Social Media Guide, and statistics about Facebook users. Dr. Shaefer said that in the United States, many medications that in the past were requiring prescriptions are now available over the counter and can be purchased without much effort. The side effects, he said, are not negligible, as over the counter drugs can have lethal effects even when applied by adults. The law requires that in general, a parent's or guardian's consent is required for medical treatment. Permitting predatory marketing of medical treatments to children fundamentally undermines this concept, and he said that the parents should not have to rely upon voluntary self-policing of the industry.

In deliberations on the bill, the Joint Standing Committee on Business, Research and Economic Development amended the bill to extend the reach to more than health-related information. The Committee Amendment defined "personal information" and eliminated the bill's application to

marketing over the Internet and wireless devices only. The Committee unanimously reported LD 1183 to the House and Senate as Ought to Pass as Amended. The House and Senate enacted the bill as recommended by the Business, Research and Economic Development Committee, and the Governor approved it with his signature on June 2, 2009.

Public Law 2009, chapter 230 was not enacted as an "emergency;" the Maine Constitution Article IV, Part Third, Section 16 provides that the law takes effect 90 days after the Legislature adjourns. The First Regular Session of the 124th Legislature adjourned sine die June 13, 2009, establishing an effective date of September 12, 2009 for all non-emergency laws, including chapter 230.

- Legal challenge

On August 26, 2009, the Maine Independent Colleges Association, the Maine Press Association, NetChoice and Reed Elsevier Inc. filed a complaint in the Federal District Court for the District of Maine seeking a preliminary injunction against Public Law 2009, chapter 230. The complaint was filed against Governor John Baldacci, Attorney General Janet Mills, in their official and individual capacities, and John Doe. The Plaintiffs sought a declaratory judgment that Public Law 2009, chapter 230: (1) violates the First Amendment of the United States Constitution; (2) violates the Dormant Commerce Clause of the United States Constitution; and (3) is preempted by the Children's Online Privacy Protection Act (COPPA) (codified at 15 U.S.C. § 6501 et seq.). The Plaintiffs also sought preliminary and permanent injunctive relief prohibiting enforcement of Chapter 230.

On September 3, 2009, the Office of the Attorney General filed the State Defendants' opposition to the Plaintiffs' motion for a preliminary injunction, as well as a motion to dismiss.

On September 9, 2009, Judge John A Woodcock, Jr., Chief United States District Judge, entered a stipulated order of dismissal of the litigation. In the order, the Court found that the Plaintiffs had met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment. The order indicated that the Attorney General acknowledged her concerns over the substantial overbreadth of the statute and the implications of Chapter 230 on the exercise of First Amendment rights and accordingly had committed not to enforce it. The order also included Attorney General Mills' representation that the Legislature will be reconsidering the statute when it reconvenes. Judge Woodcock put third parties on notice that a private cause of action under Chapter 230 could suffer from the same constitutional infirmities.

The documents are posted on the Judiciary Committee's website: http://www.maine.gov/legis/opla/judcommreview.htm.

- Request of Presiding Officers

Senate President Elizabeth H. Mitchell issued a press release on August 28, 2009, explaining that she and Speaker of the House Hannah Pingree were requesting the Legislature's Judiciary Committee to meet and review questions that have been raised about LD 1183, set to take effect

in September. The press release stated that LD 1183 was designed to protect personal information of children from being collected in an illicit manner and used by companies to target advertising. The new law provides sweeping restrictions that will prevent children from being targeted by unscrupulous marketers. President Mitchell was quoted, " Safeguarding the personal information of children is a laudable goal which I will continue to pursue. I thank the sponsors and the Committee for the bold steps they have taken to protect our children from predatory marketers. Questions have been raised about certain provisions that may conflict with the state and federal Constitutions; therefore we have asked the Judiciary Committee to review the bill to see how we can strike a balance between protecting our children and allowing access to legitimate, acceptable information."

President Mitchell and Speaker Pingree followed the District Court's order with specific authorization for the Judiciary Committee to meet for two days in October 2009 for the purpose of reviewing questions that have been raised about Public Law 2009, chapter 230. The memo to the Judiciary Committee Chairs, Senator Bliss and Representative Priest, stated that it appears that the new law, in addition to protecting personal information of children from being collected in an illicit manner and used to target advertising, may also prevent legitimate marketing or publication of information on minors and their families. The memo mentioned concerns about the possibility that the law violates the First Amendment rights of minors as well as the Commerce Clause, and is in conflict with federal laws to protect minors. The Presiding Officers directed the Judiciary Committee to review the language in light of the concerns raised in the lawsuit, and identify how best to meet the original intent of the legislation of protecting minors from data collection of health care issues, including looking at changes needed in the current law to achieve that goal.

III. JUDICIARY COMMITTEE PROCESS

A. Committee hearing and work session

1. Judiciary Committee hearing

Senate Chair Lawrence Bliss and House Chair Charles R. Priest asked the Judiciary Committee members to meet for two days in October to carry out the request of the Presiding Officers. They scheduled Thursday, October 15th to hear testimony and Friday, October 16th for a Judiciary Committee work session to develop a report. Because of the apparent interest in participating in the process, Senator Bliss and Representative Priest asked that anyone interested in providing comments to the Judiciary Committee to do so in writing by Thursday, October 8th. The notice for comments included a request that suggestions on how to correct the law be part of the response. Written comments that were received were posted on a webpage established by the Office of Policy and Legal Analysis. The response was very positive and many comments were received and posted. Members of the Judiciary Committee, as well as the interested public, were able to read the comments before the committee meetings; Judiciary Committee members were well versed in the issues when Thursday's meeting convened, and the discussion was very productive.

Chair Bliss convened the Judiciary Committee meeting on Thursday, October 15th with introductions of the members. The Committee then heard from the committee's staff attorney, who provided a brief overview of the law and the federal court case.

- **Senator Schneider, Ms. Woloson, Dr. Petzel**

Senator Elizabeth Schneider, the sponsor of LD 1183 and Senate Chair of the Business, Research and Economic Development Committee; Ann Woloson, Executive Director of Prescription Policy Choices, a nonprofit, nonpartisan public policy organization with the goal of improving access to safe, effective and affordable medicine in the United States; and Dr. Janis B. Petzel, President of Maine Association of Psychiatric Physicians, comprised the first panel of speakers. Senator Schneider, Ms. Woloson and Dr. Petzel provided updated copies of their comments submitted to the Committee and posted on the webpage.

Senator Schneider explained her reasons for introducing the original bill, LD 1183, An Act To Prevent Predatory Marketing Practices against Minors Regarding Data Concerning Health Care Issues. Although the original bill focused on the collection and use of minors' health information, and was limited to the use of the Internet, the Business, Research and Economic Development Committee agreed with Senator Schneider when she pushed for more expansive protection for minors. Senator Schneider testified before the Judiciary Committee that she had anticipated strong opposition to her original bill, and when no one provided oral or written testimony against the bill as drafted, she believed that the restrictions were acceptable and the law would be able to accommodate even more protection for minors. Public Law 2009, Chapter 230 was the result.

Senator Schneider continues to support restrictions on activities targeting those under 18 beyond what the federal Children's Online Privacy Protection Act (COPPA) addresses. Although she had asked for suggestions from those opposing Chapter 230 for ways to improve the law, she had

said she had received nothing. The Judiciary Committee's job, she stated, is to separate the realities from the myths in figuring out how to protect young people in Maine from unscrupulous practices. She suggested that the Judiciary Committee may need to commit to a fact-finding mission to truly understand the ongoing practices and the vulnerabilities of Maine youth.

Senator Schneider provided written testimony and a document titled, "Adolescents' Psychological & Neurobiological Development: Implications for Digital Marketing." She expressed her concerns about corporations gathering information and selling to minors by targeting and luring them with treats and rewards for completing questionnaires. Minors are giving away, without any type of parental knowledge, very personal information to complete strangers for their use to build profiles on them, sell their information to other companies and direct all kinds of products to them which can have significant risks to their safety and health. Senator Schneider mentioned her concerns about "neuromarketing," and cited the testimony of Jeffrey Chester who could not attend but submitted comments for the Center for Digital Democracy.

Ms. Woloson, who had testified at the hearing in favor of LD 1183, spoke from her perspective as a mother of two teenage daughters. She expressed her concerns about marketing practices targeted at kids, particularly what she termed "technological marketing strategies" that she argued were being used by the pharmaceutical industry to increase the sales of prescription drugs and other products. The marketing strategies focus on collecting personal information from minors that can then be used, shared and sold to sell products. She expressed her belief that although the federal law provides some protections for children under 13, the State of Maine has a strong interest in protecting kids 13 and over from unscrupulous activity. She cited advancements made in technology to collect information and target marketing activities and the lack of current regulatory tools at both the State and federal levels.

Ms. Woloson's written testimony included a webpage publication of the Federal Trade Commission on taking action against identity theft, two pages from the online ad and solicitation for *Easypod* human growth hormone delivery product, offering free items for providing personal information, and two pages from *NuvaRing* birth control product's website, collecting personal information in exchange for "savings offers" and additional information. Ms. Woloson outlined other examples of marketing efforts aimed at young people, citing free gifts and coupons being offered as incentives for young people to provide information about themselves. The young people are not told how their information will be used, and, Ms. Woloson asserted, those under 18 do not have the mental screening process developed sufficiently to weed out injurious solicitations or to say no. She asserted that the information that is collected to target and promote drugs to kids jeopardizes the health, safety and welfare of not only her kids, but most other kids who have access to computers at home, or are provided them through schools, and who are spending more and more time online. She urged the Committee members to work toward striking a balance - to protect the interests of those who have a real reason to be concerned about the First Amendment, while also preserving the State's interest in protecting children and teenagers from the risks associated with online predatory marketing practices.

Dr. Janis Petzel then addressed the Judiciary Committee as President of the Maine Association of Psychiatric Physicians (MAPP) and as a practicing psychiatrist. Her written testimony

provided, "Given the explosion of communication devices that have been embraced by the adolescent age group, from Facebook to iPhones to Twitter, and the level of immediacy and intimacy (and lack of parental awareness) that these media allow, and given that teens do not always recognize the risk of giving out personal information over these devices, MAPP feels that the state continues to have a compelling interest in the protection of all minors from data collection and direct marketing of pharmaceuticals or other health related products." Dr. Petzel noted that psychiatrists and physicians are particularly concerned about minor children being exposed to risks for which they are cognitively too immature to evaluate, at the same time that the pharmaceutical industry is also spending a great deal of time studying normal human brain function in its efforts to continue to improve its marketing techniques. Dr. Petzel reminded the Committee of the cases in the news in the last few years about the untrustworthy nature of information that is put out in advertisements. She mentioned the settlement with Pfizer, as well as the cease and desist letter about inappropriate Rozerem reminder ads.

Dr. Petzel discussed human development, focusing on the maturing of the decision-making center of the brain; a child's frontal lobes do not fully mature until the early 20's. She said there is some evidence that a person's executive function – the ability to plan and predict consequences – actually diminishes in the teen years. Until the frontal brain circuits fully mature, children and teens are extremely vulnerable to impulsivity, poor ability to assess risk, and to be influenced by peer pressure. Dr. Petzel asserted that there is no protection for teens with regard to marketing of pharmaceuticals. She cited a survey that found that 20% of adolescents surveyed obtained medications – allergy drugs, narcotic pain relievers, antibiotics, acne medication, antidepressants and anti-anxiety medication – from their peers without ever having gone through the protection of a doctor's advice. Dr. Petzel said that MAPP is in complete agreement with Representative Treat's testimony. She applauded the Legislature's passage of the law that protects privacy interests of minors; she thought it possible to both continue to protect the interests of vulnerable children and teens and at the same time allow for freedom of speech.

- **Attorney General Mills, Assistant Attorney General Taub**

Attorney General Janet T. Mills and Assistant Attorney General Christopher Taub provided additional information about the lawsuit brought against the State, and addressed the constitutional and preemption questions. They discussed the Child Online Privacy Protection Act, and explored using current laws to achieve at least some of the goals identified in enacting Chapter 230.

Attorney General Mills highlighted Maine's Unfair Trade Practices Act (5 MRSA c. 10) as a useful tool for the State. It already outlaws unfair and deceptive practices. The Maine statute specifically authorizes the Attorney General to adopt rules not inconsistent with the regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the Federal Trade Commission Act (15 U.S.C. 45(a)(1); caselaw interpreting the federal law can be used to interpret Maine's Unfair Trade Practices Act and its regulations. The Attorney General has successfully used this law to rein in tobacco companies, and recently stopped the practices of a survey company that was selling information. The Act does not target a particular age group, which avoids some of the concerns raised about Chapter 230.

The Maine Unfair Trade Practices Act, Title 5, section 207 provides that courts, when interpreting the Maine Act, are to be guided by the interpretations given by the Federal Trade Commission and Federal Courts to Section 45(a)(1) of the Federal Trade Commission Act. Title 5, section 207, subsection 2 authorizes the Attorney General to make rules and regulations interpreting the statute. The rules and regulations may not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1). Evidence of a violation of a rule or regulation made by the Attorney General constitutes prima facie evidence of an act or practice declared to be unlawful by the Act in any action thereafter brought under the Act.

Although Attorney General Mills admitted her concerns about predatory marketing, she voiced her trepidation about treading on the rights of teenagers. Maine law currently makes distinctions with regard to those who are 13 to 17 years old, Attorney General Mills noted, and there should be a thorough review of how the application of Chapter 230 to those under the age of 18 fits into the existing statutes. She asserted that Chapter 230 flies in the face of seven health consent laws that allow minors to seek and receive health information and treatment; and she said that Health InfoNet cannot operate under Chapter 230. (See testimony of Health InfoNet below.)

Assistant Attorney General Taub walked the Judiciary Committee through the considerations courts use in reviewing constitutional challenges to laws based on First Amendment Free Speech and Commerce Clause grounds. The analysis can be complex and must be based on the facts. Free Speech analysis depends on the type of speech allegedly infringed. "Commercial speech" can be regulated by state law if the State demonstrates a substantial interest in the purpose behind the regulation. Second, the State must prove that the regulation advances that interest. Third, the State must prove that the regulation is narrowly tailored to achieve the purpose, without sweeping any broader than necessary. If the speech being regulated is "noncommercial speech," the State must prove an even greater level of interest: the State must have a compelling interest in the purpose behind the regulation.

Assistant Attorney General Taub also explained the Commerce Clause concerns. The plaintiffs in the federal action claimed that the law: 1) regulates Internet commerce occurring wholly outside of Maine's borders; 2) imposes excessive burdens on interstate commerce; and 3) results in a potential "patchwork" of conflicting state regulations. The Commerce Clause of the United State Constitution gives to Congress the power to regulate commerce between the States; the "Dormant Commerce Clause" doctrine provides that a State cannot impose restrictions on commerce outside the State's borders and cannot burden interstate commerce by regulating what happens within the State, including by favoring local businesses over those located outside the State. The Commerce Clause is often the grounds used to invalidate the regulatory activities of states when they are inconsistent with other states' actions, thus resulting in a hodgepodge of laws that are difficult or even impossible for those engaging in interstate commerce to comply with as the regulated entity crosses from one state into another. Mr. Taub noted that the Internet causes the courts new problems, because regulating what occurs on the Internet can have nationwide implications, even if not intended to do so. He said it is hard to predict how courts will rule on challenges, as there have been rulings by courts in both directions.

The third grounds of the challenge Assistant Attorney General Taub explained, was federal preemption. Federal laws are interpreted as preempting action of the States when the federal laws regulate the specific field so completely that there is no room for the States to get involved. State laws may also be preempted when the federal law, although not actually occupying the field of regulation, contains specific provisions prohibiting the State from regulating in specific areas related to the federal law, or in any way that is inconsistent with the federal law. Mr. Taub explained that the Children's Online Privacy Protection Act contains a specific preemption provision; it prohibits states from enacting regulations that are "inconsistent" with COPPA. 15 USC §6502(d).

Although the Attorney General filed a brief advising the federal court that she shared some of the plaintiffs' concerns about the implications of the new predatory marketing law on the exercise of First Amendment rights, especially the rights of minors to access information, she did not address the merits of the plaintiffs' claims that Chapter 230 is unconstitutional.

The Judiciary Committee asked for guidance in moving forward with corrective legislation, and Attorney General Mills recommended that the Legislature specifically identify the activity to be prohibited. She and Assistant Attorney General Taub agreed that the State's interest in protecting children becomes more compelling as the targeted age gets lower. Mr. Taub pointed out that COPPA requires that the person violating COPPA must have actual knowledge that the child is under the age of 13 when engaging in the COPPA-prohibited activity, while the Maine law just requires only a "knowing" standard. (The Maine Criminal Code defines "knowingly" as applied in the context of crimes: A person acts knowingly with respect to a result of the person's conduct when the person is aware that it is practically certain that the person's conduct will cause such a result. A person acts knowingly with respect to attendant circumstances when the person is aware that such circumstances exist." 17-A MRSA §35, sub-§2.) In addition, COPPA allows a one-time provision of information to a minor under age 13, and establishes "safe harbors" of activities. Maine law is much broader than COPPA in that it prohibits the transfer of a minor's personal information, even if the information was collected with parental consent. Mr. Taub noted that prohibition on the resale of some information is being litigated now before the First Circuit Court of Appeals in a case challenging the constitutionality of Maine's prescription drug confidentiality law (22 MRSA §1711-E) in IMS Health, Inc. v. Rowe, 532 F.Supp. 153 (D.Me. 2008); briefs have been filed for the appeal in the First Circuit Court of Appeals, as IMS Health, Inc. v. Mills, (No. 08-1248). The First Circuit upheld a similar New Hampshire law, identifying the statutory prohibition on selling prescriber information as regulating conduct rather than speech, but also finding that the state limitations did not violate the First Amendment. IMS Health v, Ayotte, 490 F.Supp. 2d 163 (D.N.H. 2007), rev'd 550 F.3d 42 (1st Cir. 2008), cert. denied, 129 S.Ct. 2684 (2009). Vermont's law was upheld in the Federal District Court for the District of Vermont, IMS Health, Inc. v. Sorrell, 2009 U.S. Dist. LEXIS 35594 (D.Vt. Apr. 23, 2009, and the appeal of that decision is pending in the Second Circuit Court of Appeals.

- **Mr. Lieber, Ms. Melnick and Ms. Ossenfort**

After a short break, the Judiciary Committee reconvened and proceeded with the hearing. Former Speaker of the House Michael V. Saxl worked with the parties who had sought the injunction against the law, as well as others who are interested in repealing the law. He assembled two panels of speakers representing a range of interests to explain the problems with

the law, the law's effects on valuable activities both in Maine and outside the State's borders, and the existing regulation of information collection and use.

The first panel to address the Judiciary Committee consisted of David Lieber, DLA Piper, representing the State Privacy and Security Coalition, Alyssa Melnick, Maine Civil Liberties Union, and Kristine Ossenfort, Anthem Blue Cross and Blue Shield of Maine. All three had submitted written comments prior to the hearing.

Mr. Lieber explained that the significant constitutional problems with LD 1183 could not be quickly fixed. He then described the history of the Children's Online Privacy Protection Act, particularly focusing on the protection of children 12 years of age and under. The Federal Trade Commission surveyed websites in 1998 and discovered that 89% of child-oriented websites collected personal information from children, but only 10% required any parental consent or involvement. The report to Congress recognized that children under 12 are particularly vulnerable to marketing. Congress consciously decided on applying the law to those under 13, he said, and required parental consent for that group of children. COPPA does reflect a consensus view, Mr. Lieber stated, that it is unfairly deceptive to collect personally identifiable information from children who are under the age of 13. It applies to operators of commercial websites that are directed to children who are under 13, and also to general audience websites that knowingly collect personally identifiable information from children under 13. COPPA requires that the websites obtain verifiable parental consent for the collection and use of such information. Mr. Lieber emphasized that COPPA prohibits any state regulation of activities covered by COPPA when the state regulation is inconsistent with COPPA's treatment of those activities. He then contrasted Maine's Chapter 230 and its broad scope with the federal law. It applies to collection, transfer and use of information, both online and offline, and applies to commercial as well as noncommercial activities; COPPA applies only to collection by commercial websites. Chapter 230 covers all minors, including those 13 through 17 years of age. There is a blanket prohibition on the transfer of information, even with parental consent, which prevents compliance with COPPA. It prohibits the use of information for marketing a service or product, even with parental consent. And the enforcement provisions are problematic, Mr. Lieber said, especially the private right of action that could result in triple statutory damages for knowing or willful violations. COPPA contains no private right of action, and is enforceable only by the FTC and state attorneys general.

Mr. Lieber stated that another very important provision requires states to ensure that commercial website operators are not subjected to inconsistent regulations: the Dorman Commerce Clause, which limits the regulation of interstate commerce to Congress. It is exceedingly difficult, Mr. Lieber asserted, to regulate Internet commerce in a way that affects commerce in only one state. Mr. Lieber said that the United States Supreme Court recognized this in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), the first major United States Supreme Court opinion ruling on the regulation of the distribution of information over the Internet. (It struck down the regulatory provisions of the Communications Decency Act, designed to protect those under 18 years of age from obscene or indecent messages sent via the Internet.) "The Internet is a unique and wholly new medium of worldwide human communication . . . located in no particular geographical location." Mr. Lieber noted other cases in which state regulation of activities over the Internet have been struck down.

Mr. Lieber asserted that the Maine law violates the Dormant Commerce Clause because it applies to all entities that collect, transfer and use personally identifiable information about minors, regardless of each entity's nexus with Maine. The law effectively compels entities outside of Maine to comply with Maine law. Chapter 230 subjects entities to inconsistent enforcement by state and federal authorities. The Maine law diverges from COPPA in several significant ways, and is inconsistent with other state laws. He recognized the Maine Unfair Trade Practices Act as a potential avenue for carrying out the Legislature's intent. When asked by a Judiciary Committee member whether there is a remedy, he said there is conceivably, but it would have to be narrowly tailored to satisfy First Amendment, Commerce Clause and preemption scrutiny, and that would be a difficult enterprise.

Alysia Melnick, the Public Policy Counsel for the Maine Civil Liberties Union, focused her comments to the Judiciary Committee on the First Amendment issues raised in Chapter 230. The intent of the law is to protect minors, and the MCLU's intent is to also protect minors, but from a different perspective: Protect the First Amendment rights of minors – rights to free speech and freedom of association. She emphasized that minors have rights to access information, and to receive and distribute information. By restricting minors' rights, the law also restricts adults' rights to receive information – businesses will stop providing information because of concerns that minors will be involved, and it would be easier to just stop providing information to Maine, rather than wading through all the technicalities to ensure that minors are not participating. Chapter 230 impacts entities' abilities to reach an audience they intend to reach in Maine, which is a First Amendment violation. There is a vast range of types of information that should be available to youth. Minors should be able to access information about health care, colleges and other subject matter. Ms. Melnick strongly recommended taking action other than Chapter 230. The Unfair Trade Practices Act provides effective alternative enforcement avenues. Ms. Melnick used the example of a 17 year old who is interested in getting involved in the upcoming election, even though not of voting age; Chapter 230 would prohibit certain contacts and sharing of information, even though that is highly protected speech and the type of activity in which we want our youth to engage.

Instead of prohibiting the reselling of information, Ms. Melnick promoted alternative ways of addressing the concerns: Virginia has robust online safety curriculum; things that parents can do, including blocks on computer access, can also be effective. She doubted, however, that the state can enact restrictions on selling information without running into First Amendment problems. Perhaps requiring a warning that information collected could be sold for marketing purposes would be permissible. Mr. Lieber agreed that alternative actions were possible, and mentioned mandatory Internet safety courses, which states are starting to adopt. He asserted this type of approach is better and more effective. When asked if Internet companies would contribute if subjected to assessments to pay for Internet curriculum, Mr. Lieber said he hadn't contemplated that approach, but he did note that companies now spend enormous resources to help education and to provide tools for parents. Ironically, companies may have to ask for more information to comply with the Maine law than they would without the law, Ms. Melnick noted.

The last presenter of the panel was Kristine Ossenfort, Government Relations Director of Anthem Blue Cross and Blue Shield of Maine. Ms. Ossenfort started the transition from the first panel to the second by explaining the laws that already apply and touching on the unintended

consequences of Chapter 230, and the burdens Chapter 230 imposes on health care in Maine. She emphasized that there are a number of state and federal laws that already govern what can be done with personal health information, of both adults and minors. Maine has an Unfair Trade Practices Act, and the Uniform Deceptive Practices Act is already on the books. Title 22, which contains the health care statutes, governs what health care providers can and can't do with medical information in this state. The Insurance Code Title 24-A, governs what insurance companies and third-party administrators can and can't do with personal information. Included in Title 24-A is the Insurance Privacy Protection Act. Both the Insurance Code and the Banking Code have their own unfair trade practices acts contained within Title 24-A and Title 9-B, respectively. Health insurance carriers have been exempted from Maine's Unfair Trade Practices Act and the Uniform Deceptive Trade Practices Act because of the Title 24-A provisions. Insurance companies, financial institutions and other types of financial services entities are also subject to Gramm-Leech-Bliley; in addition, health insurance carriers, health care providers, third-party administrators and pharmacy benefit managers are all subject to the provisions of the Health Insurance Portability and Accountability Act of 1996, also referred to as HIPAA.

Ms. Ossenfort explained the concern that Chapter 230 creates another and an inconsistent set of regulations that govern activities relating to health care in Maine. Chapter 230 prohibits the sale, the offer for sale or the transfer of health related or personal information about a minor if it was unlawfully collected (collected without verifiable parental consent), it individually identifies the minor or if it will be used to in violation of §9553 (which prohibits the use of health related or personal information about a minor for the purpose of marketing any product or service or for the purpose of promoting a course of action for the minor relating to a product). Ms. Ossenfort said that Chapter 230 significantly impedes the ability of health insurance carriers, third-party administrators and pharmacy benefit managers to administer health insurance benefits and to engage in care management activities. Health insurers are severely limited under the law in processing health care claims and providing many of the services offered, including care management services and recommendations on more cost-effective prescription medications. Chapter 230 rules out communications with the minor without parental consent; it also prohibits communications directed to the parent or guardian when related to the promotion of a course of action for a minor. The law prohibits the sending of reminders to parents about vaccine updates. Insurance companies would not be able to work with the Maine Bureau of Insurance on school H1N1 vaccinations.

Ms. Ossenfort recommended that any legislation on this issue mirror the existing exemptions under the Unfair Trade Practices Act and Unfair and Deceptive Trade Practices Act and exclude those activities and functions permitted by HIPAA and the Maine Insurance Code's Insurance Privacy Protection Act.

- **Mr. Gerrity, Mr. Emmert, Mr. DelBianco and Mr. Harnar**

The second panel focused on the effects of Chapter 230. The speakers were Bruce Gerrity, Steve Emmert, Steve DelBianco and Jim Harner.

Bruce Gerrity, an attorney with Preti Flaherty in Augusta, represented several entities, including the Maine Press Association, Maine Independent Colleges and the Property and Casualty

Insurance industry. He said that the concerns of the Press Association are pretty basic: They cannot report on student athletes in sports, or report who is in the top ten of their high school classes or who is the valedictorian. The law prohibits reporting on a sick child in the community, such as supporting outreach efforts to help the family or provide community contributions. For example, a young man at Maranacook was dying of a fatal disease; his only wish was to have lighting on the athletic fields. The effort to make his wish come true was a community effort, and it is now an enduring legacy; the lighted fields have been named in his honor. The fundraising and completion of the project could not have happened under Chapter 230, Mr. Gerrity asserted. Colleges need to exchange information with young people in order to provide help with financing, send information about schools, attend college fairs and use universal or common application forms.

Mr. Gerrity brought up the recent outbreak of "swine flu" at Bates College that has been covered in the media. He noted that there is information about particular people in the stories, and some of those individuals are minors, and there are health-related aspects to the stories. There are people in the college who want to send information about swine flu to students, including where to get more information, where to get services about how to be inoculated, what are the options. Chapter 230 would inhibit that from the college's perspective. From the Press's perspective, how can they report information that is so important to the community and has major health ramifications, not just at Bates College, but implications for the entire community? Although not the intent of the legislation, it is one example of how sweeping the effect of the legislation is. Mr. Gerrity said this law is not narrowly tailored, not narrowly designed, and that is one reason why the Attorney General believes there is not a way to save Chapter 230.

With respect to the insurance industry, Mr. Gerrity said that companies use agents, and agents would not be able to call companies and describe a young person who has completed a safety program, driver's education or has good grades to determine whether a "good student" discount is available for the child's automobile insurance. The insurance company would not be able to contact its affiliates and send the information to an affiliate who writes that type of insurance. The law precludes those activities, he asserted.

Mr. Gerrity expressed his concerns about requiring Internet companies to contribute funding for educational programs concerning identity protection and safe Internet use, saying that such requirements may violate the First Amendment protection of free speech, especially with regard to companies with few resources. Such requirements would have to be applied equally across all companies, whether for-profit or non-profit, whether large or small, or there will be an Equal Protection problem.

Steve Emmert, an attorney and the Director of Government Affairs with LexisNexis of Reed Elsevier, has been with his company about 20 years, working with access to information issues, including First Amendment concerns. Reed Elsevier was one of the parties involved in the lawsuit against the State. LexisNexis does not engage in marketing of any products or services to minors, but LexisNexis was significantly impacted by Chapter 230; the company collects information and sells it. There are many purchasers of the information, and for different purposes. Mr. Emmert's customers include major law enforcement agencies across the country. Reed Elsevier has contracts with many state and local agencies in Maine. The information is

made available to the agencies to help facilitate investigations as well as to simply implement existing laws – traffic tickets, or civil matters. Sometimes police want to know who parked that car in that spot, where they live, whether a ticket will be paid. Reed Elsevier, he said, provides information that allows local governments to help collect on those tickets. It is important to keep in mind, he said, that children – persons under the age of 18 – drive cars on public streets, they can own a motor vehicle – could be a motorcycle or a car – they could run over a family member or your dog. They may commit adult crimes, they may witness crimes, they may witness accidents. They may want to open bank accounts. They engage in activities that are laudable and sometimes reported in the press – whether working on a charity project or a fundraiser, or whether they score the winning touchdown in a high school football game. One of the things LexisNexis does is reproduce news reports from across the country, from more than 3000 sources. Many of these from time to time mention minors. It is rarely clear whether parental consent was given at the time. It does include the name. Newspapers, because they didn't know this law was on the books, did not include the name and the age, so LexisNexis would know which information not to reproduce. An article that reports that John Smith scored the touchdown, but it does not report whether John Smith is 18 or 15 or 23.

Mr. Emmert also asserted that requiring parental consent is not always in Society's best interests. A person has committed a crime: arrested, convicted as an adult – perhaps they are 17. Mr. Emmert said he was not sure the parents would necessarily consent to the release of the information. Should law enforcement be limited to only the circumstances in which the parents consent? It is not necessarily in the longer-term interests of the State and Society to have those types of restrictions in place.

LexisNexis reports public records, public documents, news stories, journals, periodicals, almost anything the company can access that is in print. The information is made available to professionals, made available to government agencies, made available to the courts to do real research on people but also on issues. Contrary to some beliefs, Chapter 230 isn't just about marketing. It says a person cannot collect, offer for sale or otherwise transfer to another person personal information about a minor if the information individually identifies the minor. That is what brought Reed Elsevier to the court.

Mr. Emmert spoke about his involvement in developing COPPA, and the selection of the maximum age to be protected. The "civil society groups," he said, believed the distinction between 12 and 13 years of age was very important. He does not believe that the age limit was driven by commercial interests. Some parties were willing to accede to a higher age, he said, but the civil society organizations were adamant about ensuring adolescents have access to health and reproductive information; the First Amendment needs of the minors dictated the lower age limit.

Mr. Emmert explained that COPPA is driven by a series of industry self-regulatory programs. If a person notices a problem with a website, the person can complain to the Direct Marketing Association; but no corrective action will be taken until someone complains. The FTC has backstop authority for enforcement if the industry doesn't correct the problems first.

Mr. Emmert pointed out that the Federal Trade Commission has extensive information on its website for children, including educational materials about Internet and online safety and privacy. There is no reason the State of Maine could not implement a similar program, he suggested.

Steve DelBianco spoke next. He is the Executive Director of NetChoice, a Washington, D.C.-based coalition of e-commerce companies; members include AOL, eBay, Expedia, NewsCorp, Overstock and Yahoo, and several thousand small e-commerce businesses. At both state and federal levels, NetChoice opposes regulatory barriers to e-commerce and promotes legislation and enforcement that raises consumers' trust and confidence. NetChoice developed a package of draft legislation, working with American Legislative Exchange Council and the Council of State Governments, to pursue and control child predators, registered sex offenders. Mr. DelBianco regretted that NetChoice had missed the discussion on Chapter 230 as it worked its way through the Legislature in May. He noted, however, that even if all the legal issues had been addressed, there would still be unintended consequences, and unintentional and undesirable consequences that would still support repeal of the law. Mr. DelBianco provided a one-page handout, summarizing NetChoice's comments on Chapter 230, and showing information from the "Ski Maine" group on Facebook, of which Mr. DelBianco is a member, and results for a Google search of "teenage acne scars," which include "sponsored links" that are advertisements for remedies for acne scars. He surmised that concerns are about Web 2.0 services – the interactive nature of Twitter, Facebook, blogs and online fora are how today's teens use the Internet to define themselves and connect with others. People viewing the content are also contributing to the content. Participants need to register in order to interact. Platforms such as Facebook need participants to register because Facebook needs to know who is adding content, in case there is a report of a violation of terms or other problems. Web 2.0 services are almost always free to users, and they are paid for through advertising. The advertising is targeted to the interests of the users. An interest in a website identifies that person to target for that type of interest, which could be a violation of §9553. The same section applies to search engine websites that then target ads based on the term typed in as search terms. Google, for example, includes sponsored links that are based on the subject matter entered in the search field.

Mr. DelBianco pointed to the statutory damages as the element of Chapter 230 that causes the most concern to the companies, and of the most interest to plaintiffs' attorneys. He also noted that Maine allows class action lawsuits. Because companies will not want to risk the potential penalties, they may choose to "lock out" Maine teens; obtaining verifiable parental consent is too difficult. Most companies responded to COPPA by stopping their targeting of minors under 13; very few go through the verifiable parental consent process, and they may still be subject to lawsuits. Although there is some ability to identify location of users, using IP addresses, there is not universal agreement that such a process is successful. And there are problems near state borders, such as along the Maine-New Hampshire boundary. Mr. DelBianco said that the online companies may choose to respond with what amounts to a "black out" of relevant marketing information provided to Maine users and users in other states who appear that they may be from Maine. For the companies that want to minimize their exposure in Maine, when a person registers on their sites as from Maine, a screen may appear that says the site cannot serve a Maine minor, because the company cannot effectively obtain verifiable parental consent to reduce the lawsuit risk. Without naming names, Mr. DelBianco said that there are currently a

few services that are "browning out" applications to Maine users; they are suppressing the e-mail messages and marketing that are going to Maine users based on IP addresses. Maine users still see the ads, but the ads are not as relevant, not as targeted, and the e-mails aren't as targeted.

Mr. DelBianco explained that successful marketing is not about exploiting teens but it is about appealing to teens, without turning then off. We will all be bombarded by holiday marketing. He mentioned that in the movie, "A Christmas Story," Ralphie would not have been permitted under Maine law to join the Little Orphan Annie Club to get the decoder ring. He said that today's teens are much more sophisticated than Ralphie. They spend over 20,000 hours on the Internet by the age of 20, which is equal to the amount of practice a piano virtuoso engages in. Academic studies indicate that a 12 year old can distinguish between what is advertising and what is information. Mr. DelBianco stressed that there are more dangerous activities than engaging in Internet surfing.

The concern over marketing of prescription drugs is overblown, Mr. DelBianco believes, because minors can receive prescription drugs only with parental consent and through a written prescription. The parental control is in the purchase of prescription products; there are ways to control the danger. He recommended that the Judiciary Committee find a balance that preserves access to services and content which are paid for by advertising, but at the same time punish those who would deceive our teenage kids. Mr. DelBianco would begin with repeal of Chapter 230, then follow the advice of the Attorney General: Understand and articulate the specific practices you want to stop.

Mr. DelBianco offered suggestions for the Committee's next steps. First, identify the appropriate target of regulation. Engage in fact-finding to determine what is actually occurring, and what activities are harmful. Document these neurocognitive findings. What presents new threats to kids? Second, figure out current state and federal laws on deceptive practices and the functional regulation of laws such as HIPAA and insurance and financial statutes. Step three, identify the gaps – where are there gaps in that whole regulatory milieu in which bad practices are not captured? He offered to help craft a law that combats the bad practices not already addressed, with minimal unintended consequences. He believes that there are existing Maine laws sufficient to achieve the goals that the Maine Legislation has identified.

Mr. DelBianco said that COPPA review has been requested by the FTC. The review is supposed to cover all wireless devices, as well as "virtual worlds." He mentioned a special task force has been recently established by the Commerce Department, within the National Telecommunications and Information Administration, under the "Protecting Children in the 21st Century Act." Mr. DelBianco introduced Braden Cox of NetChoice, a member of the Online Safety and Technology Working Group, which has been charged by Congress to meet for a year to study the kinds of issues being discussed with the Judiciary Committee: child safety issues online and how child-targeted marketing affects children and their safety and privacy. The working group has already heard from law enforcement on these issues. The membership is fairly broad: industry, child safety experts, behavioral psychologists, law enforcement, the Federal Trade Commission, the Department of Justice, the Department of Education and the Federal Communications Commission. Mr. Cox described a recent meeting on education. The salient point about education, he said, is to get to kids early while they are still developing skills.

It is important to avoid a fear-based approach that tries to keep kids off the Internet, because they are "digital natives" and will be on the Internet. Efforts should be made to find the youth who are most at risk and focus on them. Most kids are fine, they are using the Internet in ways that are adding to their daily lives, which is why blanket laws in this area can really be troublesome.

Mr. DelBianco commented on the ability of companies to secure and rely on "verifiable parental consent." He noted that some websites that supposedly ensure that the participant is of age or has parental consent depend upon the participant's honest selection of the appropriate "radio buttons;" but there is no other substantiation of the age or the consent.

James A. Harnar, Project Consultant for Health InfoNet, spoke to the Judiciary Committee about the concerns of Health InfoNet, a Maine statewide electronic health information exchange. He provided a copy of his remarks. Health InfoNet is in a two-year demonstration stage; there are 15 hospitals participating in the program. Maine becomes only the third state to go online with electronic health care records. The purpose is to make sure that physicians and other health care providers have access to key health information about each patient 24/7 no matter where the patient is in the State of Maine. Mr. Harnar said electronic health information exchanges are a pillar in the nation's health reform efforts. They are a prominent focus of the Recovery Act, and the overall area of health information technology is seen as one of the ways we can moderate the costs of health care and improve quality and patient safety at the same time. The State of Maine has invested substantial dollars in the development of Health InfoNet in the past five years. It is a statewide nonprofit, public-private organization.

Under HIPAA and Maine's general health information confidentiality law in Title 22, section 1711-C, health information exchanges and health care providers are subject to rigorous restrictions on the use and disclosure of protected health information. Mr. Harnar said Chapter 230 seriously impinges upon a health information exchange's ability to facilitate health care coordination activities between health care providers. No additional consent forms are required, as HIPAA provides the necessary protections. Chapter 230 requires parental consent prior to the exchange of protected health information relating to a minor between two physician involved in a minor's health care. It also prohibits a health information exchange from submitting mandatory reports concerning minors to the Maine Center for Disease Control and Prevention (Maine CDC) for public health purposes.

Mr. Harnar suggested that any legislation in this subject area exempt activities and functions permitted by HIPAA, Maine's general confidentiality law and other applicable state and federal laws.

- **Representative Treat and Professor Flynn**

After a lunch break, the final panel of the day convened. It consisted of Representative Sharon Anglin Treat, a cosponsor of LD 1183, and Professor Sean M. Fiil-Flynn, the Associate Director of the Program on Information Justice and Intellectual Property at American University Washington College of Law.

Representative Treat provided the Judiciary Committee with written copies of her testimony as well as exhibits describing studies and analysis of predatory marketing practices targeting young

people, especially with regard to prescription drugs. Representative Treat identified the Judiciary Committee's task as a narrow one, and explained to the members why Chapter 230 was enacted in the first place. The Business, Research and Economic Development Committee supported the legislation unanimously, as did the Legislature as a whole. A case was made in the April 2009 hearing and subsequent committee work sessions that there really is a compelling interest in regulating the unfettered collection of personal information from minors – personal information that is not generally public – for use in marketing health products, including drugs. She said that allowing that without some oversight is not in the best interests of a vulnerable population; such data collection and marketing activities could place children at risk. The law as finally enacted is not as it was initially drafted; which she pointed out creates some of the challenge for the Judiciary Committee. Originally, LD 1183 focused on the collection of data and the use of that data – possibly through sale of the data to another party – to then market back to young people, particularly with respect to health-related products, particularly prescription drugs, but not limited to that. She noted that a lot of the testimony given was about all the other things the legislation does or is claimed to do, which are unrelated to the core focus of the initial legislation.

Representative Treat assured the Committee that the focus of the sponsors and supporters of Chapter 230 was not the plaintiffs' bar filing suits and making lots of money, but was concern over the use of the Internet and mobile technology to collect personal information from minors and then using that information to market products and services to minors. She explained that Profession Flynn will follow her and go through the legal provisions; he has participated in cases relating to the First Amendment and data collection.

Representative Treat chose to focus mainly on prescription drugs, and she highlighted pharmaceutical companies and their roles in unscrupulous information gathering and marketing. She explained that the Committee needs to understand that the marketing to young people takes place within the context of misleading marketing that goes on generally to adults and the medical community, and she mentioned the $2.3 billion settlement between Pfizer, Inc. and the federal government. The company agreed to plead guilty to a federal criminal charge of illegally marketing the painkiller Bextra and will pay the agreed-upon sum for illegally promoting the sale of that and other medicines for unapproved uses. There have been a long line of cases, and Representative Treat noted that the Food and Drug Administration is just starting to looking at online information and marketing. Even though the FDA has rules regarding marketing to consumers generally, it does not have specific rules governing marketing to children. The FDA has started to look at these issues because they recognize that there is a problem. Representative Treat said this is a case in which Maine is on the leading edge of the curve. Maine has the growing pains because no one else, including the federal government, has done it yet. She said the Legislature needs to look at the regulation and determine if there are gaps, and can Maine step in to fill those gaps.

Representative Treat reported that there is compelling evidence that marketing to young people is very effective. The question has been raised whether the focus should be on just those 13 and under. Representative Treat emphasized the testimony of Dr. Petzel – the pressures on teens are very real, and there may be just as many reasons to be concerned about the marketing to teens as there are in marketing to young children.

Representative Treat included articles on the background about the teen population and marketing to teens. Young people are online all the time; there are a lot of studies about how much time they spend, and how willing they are to share personal information. She said it is a problem and it really is happening.

Representative Treat specifically highlighted a couple of concerns. Studies show that 85% of teenagers get acne, so naturally ads are targeted at them. She is concerned about the marketing to them and their particular vulnerabilities. She called attention to the materials on Accutane, a very powerful acne prescribed product. There are some really significant side effects, including being linked to suicide and birth defects; the drug is involved in consent decrees about the marketing because the advertising did not disclose those side effects appropriately. Representative Treat said Accutane makes the case that there is an issue here, and the issue that rises to the level of a compelling state interest, although this is not a regulation case that requires a compelling state interest, because it is commercial speech, if it is speech at all; it does raise another question: does data collection trigger a free speech analysis?

Representative Treat brought up Yaz and Yasmin, which are birth control drugs marketed to children and for which there are many marketing problems; in fact there have been over 300 lawsuits filed over marketing and the lack of disclosure of very serious risks, including blood clots, heart attacks, stroke, etc. One of the suits is about misleading investors in the company. Representative Treat expressed a need to think about the audience. Even the medical community and very smart investors are not getting the whole story and are winning lawsuits because of the misleading information.

Representative Treat asked if anyone - a teen or anyone else – wants to get information or even a coupon mailed to them, why is it important to provide a whole lot of information about themselves in addition to their address? How much of this data collection is necessary if young people just want to get information, or want to receive something? How much information do they really have to send, and what is appropriate?

The second question Representative Treat raised is what happens to that information? Under COPPA, selling that to someone else is not allowed. There are gaps in COPPA, obviously, because it does not cover anyone over age 13. She asked the Committee to take a look at the existing privacy protections under HIPAA and COPPA. Where are the gaps? HIPAA applies to health care providers in particular, although it does cover some other entities, but does it cover a website that is encouraging people to take Accutane? If it does not cover it, then the State of Maine is free to step in and close that gap.

Representative Treat referred to an earlier discussion about disclosing on the website the fact that personal information will be sold. It is not the same thing as saying "don't sell it," but it is an interesting question. Representative Treat agreed that providing more information to let people know what they are getting into is a very valid thing to do.

Representative Treat clarified that her presence and testimony are as a legislator, although she is the executive director of a nonprofit organization that works on public policy issues related to prescription drugs. Her participation is on her own time as cosponsor of the bill.

Representative Treat agreed that the bill had been expanded to cover things it was never intended to cover. There was no intent to cover someone signing up for a political campaign. There was no intent to cover someone who is interested in getting a college catalog and applying online. It is very clear that none of the testimony covered any of those purposes. There is a secondary concern about selling the information. The original focus Representative Treat had was health information, personal information as related to health information and marketing of health products. She supports prohibiting the collection of personal information that is then used for purposes relating to health or sold. The law can be narrowed, but she believes looking at the information collected is still relevant. The original was to focus on online activities, but online including mobile technology. Things are changing so rapidly; year to year there are new vistas from where people are getting information. People are selling information, and we are interacting with others. COPPA does not address all the cell phone activities that are analogous to activities on the Internet. HIPAA was adopted at a time when many of the online uses were not yet developed. Representative Treat emphasized the need to look at how new technology is affecting sharing information and access to information, and the potential harms that come from that.

In response to questions, Representative Treat explained that the amendment to LD 1183 was designed to bring the bill more in line with COPPA, but ended up covering more than originally intended. Most people were focused on mobile technology and online activities, she said; the additional things became involved inadvertently.

Professor Sean Flynn clarified that he was attending the hearing in his personal capacity as opposed to on behalf of any client. He noted that he is not a policy advocate, but was there to answer questions about the law. He explained his participation as counsel for consumer organizations and states in a number of recent cases involving First Amendment challenges to health privacy regulations, including litigation in the First Circuit upholding New Hampshire's prescription privacy regulation and the current litigation in the Second Circuit regarding a similar prescription record privacy law in Vermont. The cases have focused on privacy of prescription records and commercial speech issues and the activities of prescription drug companies and data miners. Professor Flynn provided written comments to the Committee prior to the meeting, and made available the brief he filed in the Second Circuit litigation.

Professor Flynn said it is important to review the purpose of the First Amendment: the core purpose is to protect public speech, to promote democracy: to protect speech that citizens engage in to hold the government accountable and to promote democracy. An additional idea is that the First Amendment is supposed to promote a wide, open robust public marketplace of ideas. The First Amendment protects not just speech that is purely political in nature, but protects speech that is purely factual when that speech contributes to the broad, open marketplace of ideas that it is intended to promote. When speech takes place in public and in the open, then it is the marketplace of ideas that cleanses that speech and is what Justice Holmes titles "the best test of truth." The further the communication gets away from the public deliberation ideal, the less protection is provided by the First Amendment. The public/private dichotomy exists for two different categories. The first criterion is what kind of information is being conveyed. The second factor is the forum where that information is conveyed. The more that public speech

takes place in public fora and is sharing speech that comes from the public domain, the stronger the protections that apply.

Professor Flynn explained that commercial speech enjoyed no protection until a Supreme Court ruling in 1974. The Court held that consumers need to know the price of medicine advertised in the newspaper, just as they need to know other facts that are reported in the newspaper. It is not confidential information that is being shared; it helps consumer purchases; it also may help citizens form opinions on medicine policy. That is when the distinctions between self government speech and consumer-oriented speech broke down, he explained, but the speech itself was taking place in a traditional public forum: newspapers.

Professor Flynn said that the most scrutiny is applied when states regulate or ban the sharing of information such as prices, alcohol content of beer or the price of prescription drugs, when advertised in public means – newspapers or the public airwaves. The Supreme Court tends to adopt a very strong scrutiny in that context that approaches what would be applied to protect political speech.

On the opposite side is the regulation of private information that is only communicated in private. A case is pending in the Second Circuit in which Vermont is challenged in its regulation of the commercial trade, rather than the public disclosure, of information drawn from medical records, particularly prescription records. A similar case against Maine is pending in the First Circuit. The First Circuit already upheld a similar New Hampshire law. The court found that the law did not regulate speech because the communication that is taking place is not taking place in public, it is not advertising that information, nor releasing it in a newspaper or a public affairs radio show, etc. The information is presumed to be confidential: when people turn over their medical records to a pharmacy they presume that the pharmacy is not going to turn around and sell that information to pharmaceutical companies to target their marketing. Professor Flynn said that this is an example of a regulation that focuses on the confidentiality of information that is not in the public domain in the first instance. It regulates the purely nonpublic commercial uses of that information: communication that is being regulated in private fora, under a contract between private parties, and the information itself is of a private and confidential nature.

Professor Flynn asserted that that the more a state focuses on the private information being disclosed through confidentiality protections, the more the state is avoiding the regulation of the public disclosure of that same information through newspapers, through factual reporting, etc. – if a state carves that out with exceptions or narrowly tailors the prohibitions so the law does not go there, then the state will be on much stronger footing under the First Amendment.

Professor Flynn then applied that framework to the different provisions of the bill. He said that information identifying minors is traditionally private information in our society. Through many ways and many different laws, we protect this information because we are worried about minors, we are worried about the effect of marketing on minors, we are worried about the disclosure of minors' identities. Laws in many states prohibit newspapers from publishing the names of minors accused of crimes or as victims of crimes. Those same laws do not apply to adults – we have a special concern about information about minors being released. To the extent one focuses on the confidentiality of minors' identities, Professor Flynn said that the focus is on the private

side of private information. States have more room under the First Amendment to regulate the commercial use of private information when the regulations focus on the protection of information's confidentiality. The more a law restricts the strictly commercial use of confidential information - as opposed to focusing on the release of the information into the public sphere in general, such as being used in newspaper articles, etc. – the more the law falls in line with the part of the First Amendment that authorizes regulation by the States.

Where the bill begins to regulate not only the confidentiality in the first instance, but the sharing of that information for sharing other public information – public domain information, from college admissions information to prescription drug pricing – Professor Flynn said there are higher justifications for why that is a problem and why the regulation is narrowly tailored to meet that problem. That is not to say that the only place that states can act is in the private information-private use box, but when you move out of that box, the stronger your justifications must be, Professor Flynn asserted. The Supreme Court has said that protecting the interests of minors is a compelling interest, which is the strongest interest in First Amendment analysis. You also need to narrowly tailor the bill to the interest you are regulating. Professor Flynn recommended that the Committee focus like a laser on the problems that are before it.

Professor Flynn admitted that although he had not read the entire record from LD 1183 or this proceeding, he had been able to identify one or two broader interests. He believed he can make a legal determination on the weight of the evidence.

One interest is prescribed products – for example, the direct marketing of prescribed acne medications to teenagers. A wealth of information has been presented in other cases and has been hinted at in some of the footnotes before the Committee. The reason certain products require a prescription is because they have larger, harmful effects than things we allow to be marketed over the counter. It is the fact that dangerous products are being pushed to teenagers that causes serious concerns. There is information that teenagers are a highly susceptible population, although it is not yet clear whether there is enough information that there is a specific problem with those between the ages of 13 and 17 – the currently unregulated area (COPPA already prohibits most of the practices that Chapter 230 targets for those under 13). LD 1183 expands the protections to the 13 to 17 age group.

Professor Flynn noted that there could be a broader class – other products that have health effects that may or may not require a prescription: Over the counter drugs, hazardous foods, etc., although he did not know how much information about these items was before the Committee.

Professor Flynn recommended focusing an amendment to section 9552, as it applies to the unlawful collection for marketing purposes: tailor it to marketing purposes that impact health, or the marketing of prescribed products, if those are the Legislature's primary interests. Those seem to be the two main categories. If the Committee thinks there is another category, he recommended using language that specifically tailors it to that category. The most important lesson is to tailor very carefully what the prohibition is to the problem that is on the record.

Professor Flynn said the second important step is to develop legislative findings. First Amendment cases are all about deference to the Legislature versus the ability of the court to

make its own conclusions. The more the Legislature speaks clearly by, for instance, making specific findings about the record before it, the more the courts will defer to those findings. Courts hate to overturn the factual findings of the Legislature, Professor Flynn said, because it is not their role. It is the Legislature's role to determine what is the record before you and what factual determinations you should conclude from that record. If you are silent, then a court may weigh in. If you speak clearly, the court will be under a heavy obligation to defer to that statement.

Third, Professor Flynn said to make sure there is a record from which to draw those conclusions. The evidentiary record need not be pointing 100% in one direction. To the extent there is evidence supporting different sides, it is the Legislature's job to examine those facts and determine what is more weighty. Once you make that judgment, the courts will defer to that finding; under the doctrine of intermediate scrutiny – the standard of review the courts apply – courts are required to defer to the Legislature's factual judgments.

Professor Flynn also said that another way to strengthen the bill is to try to track COPPA as much as possible. If the intent is to expand COPPA in this one narrow class – the marketing of health products – in the 13 to 17 year old age group, then make sure you use the same legislative provisions that COPPA uses.

Professor Flynn said there are multiple First Amendment rights and interests. On the one side is the interest of the marketers. There is also an interest on the part of minors themselves to receive and impart information. The interests of the State come into that communication to decide when the people receiving the information from the minors are using it for purposes that the minors themselves did not intend. COPPA permits minors to request information from online marketers and then prohibits those online marketers from retaining that information for secondary marketing purposes. For example: A 16 year old woman is seeking abortion information and gives personal information. Under the COPPA structure, a provider could give information, but then can't retain that minor's identity to do follow up contacts, follow up marketing or sell that information to others. Professor Flynn said that if the COPPA framework is used, the law would not be impeding the rights of the individual to receive information, but it would be limiting the right of the marketers to have secondary uses of the information, which probably were not intended by the minor in the first place. There is a host of federal and state legislation that take on that similar role – prohibiting the secondary uses of information: Information that is turned over by consumers for one purpose then taken and used for another purpose by the receiver of the information. This is a shift from the First Amendment interests of the consumer to the interests of the marketer. For instance: the Video Privacy Protection Act is a federal law that prohibits companies that rent videos to you from taking your video rental purchases and either disclosing them to others or using that information to market new information to you. The Act respects the First Amendment right of the consumer to give over that information to rent a video, but prohibits the receiver of the information from using that information for a secondary use. The Driver's Privacy Protection Act, which was upheld in Reno v. Condon, 528 U.S. 141 (2000), prohibits marketers from accessing DMV records and identifying information in those records and using it for marketing purposes, but it does not restrain newspapers and others who are engaging in the public sphere from using that same information to report on an accident. A lawyer could not obtain information about an accident to market legal services, but a newspaper

could get the same information from the same source to report information of public concern.

Professor Flynn said that aligning prohibitions as COPPA does into regulating the secondary uses of information fits the prohibition into the area in which states have the most authority to regulate without prohibiting the individual from receiving or imparting information in the first instance.

Professor Flynn then turned to the Commerce Clause and federal preemption issues. The Commerce Clause, he explained, is the doctrine we all hate because it is incredibly confusing and complex. The purpose of the Commerce Clause is to prohibit states from essentially acting to discriminate against foreign commerce in order to favor their local commerce. That is not going on here; there is no Maine interest that is somehow advantaged by protecting the confidentiality of minors in these situations.

Another Commerce Clause ground that Professor Flynn said is particularly underdescribed by the Supreme Court is that states cannot regulate commerce that takes place wholly outside of their boundaries. State regulations tying alcohol prices to outside alcohol prices were struck down. A state cannot pass regulations the effect of which is to affect activities that take place wholly outside of the state's borders. A third Commerce Clause ground (and Professor Flynn said this starts bleeding into a preemption ground) is that states cannot regulate commerce in such a way that it basically makes interstate commerce impossible. Under Chapter 230, marketers are coming into the state to collect information from residents of Maine. If that is a concern, the Legislature can add a clause that says: "Nothing in this act has any effect on economic activity that takes place wholly outside of Maine." Normally, states interpret legislation to have such a clause in it because it is always presumed that the intent was to regulate activity within the state. The mere fact that the Internet host or the designer of the website exists outside of Maine does not insulate it from Maine regulation when what they are collecting is information from Maine children. This is not a violation of the Commerce Clause on discrimination grounds.

In his experience on the Internet, Professor Flynn said, it is not impossible to comply with statutes from different jurisdictions. When he logs onto Facebook in Washington, D.C. and Facebook in Maine, it displays different ads based on where he is located. Professor Flynn confessed that he is not an Internet expert, but he believes it shows that people who market over the Internet know where he is and they can therefore tailor their messages to him.

If regulations have an extraterritorial effect, then all marketers would have to comply with the most restrictive regulation. Internet companies are capable of tailoring their messages based on where the user is located. Amazon.com is an example: When a purchase is made from Amazon.com, because every state has a different tax law, it requires the purchaser to tell where he or she is located and then it calculates the tax based on that information. A super elementary tool would be if the marketer is requesting information from a person and the marketer asks what state that person lives in, the marketer can stop the activity with that person because Maine has a different law on marketing. Professor Flynn did not see that that would be an undue burden on interstate commerce. It is up to the Legislature, he said, to make the factual finding as to what technology exists and whether those mechanisms would reach the stated policy goals. Of course,

a person can lie about where he or she lives. COPPA relies on a certain amount on self reporting; it does not mean you don't regulate at all in that area.

Representative Treat interjected that Chapter 230 establishes violations based on "knowing" while COPPA is based on "actual knowledge." Does the Legislature want to go along with the same standard in Chapter 230, or COPPA; or use the Unfair Trade Practices Act? If someone lies, who is the burden on? She suggested that the COPPA standard be used and that COPPA be expanded in Maine to cover 13-17 year olds for health-marketing purposes. She recommended tailoring the statute to health-related marketing, not health-related information.

Professor Flynn addressed the rights of marketers. People who are seeking to market in the public sphere are entitled to less regulation. When the marketing starts moving into the private sphere, the public can no longer see it and comment on it. When outside of the broad public marketplace of ideas, the Court has said that states can regulate channels of communication that are especially prone to undue influence. Professor Flynn mentioned a case in which a state was allowed to completely ban colleges' marketing on a person-to-person basis to high school athletes because it is much harder to monitor what undue influence in the communication is taking place. States have much wider authority to regulate and even ban that mode of communication, because the channel is prone to undue influence. Under the same philosophy, states are allowed to ban attorneys from personally soliciting accident victims in a hospital or at the accident scene. An attorney can take out a newspaper ad that says, "I am the Accident King." That is in the public sphere; everyone can see that communication and comment on it. In the situation in which the speech is one-on-one and targeted and personal, it is very hard to identify when the speech is misleading. Professor Flynn said that is very important – states have a legitimate interest in commercial communication cases, different from political communication, because the state can regulate the subject of speech to avoid misleading communication. When a teen signs up for a prize award, the teen thinks he or she is providing information for a prize when in fact the teen's information is really being collected for marketing; that can be a form of misleading communication. When communication is taking place outside of the public sphere, it is hard to ensure that the communication is not misleading. That is why, Professor Flynn said, all the drug ads are regulated. There is a substantial state interest in making sure speech is not misleading. The state's interest in regulating the channels of communication is heightened when that communication is taking place in a targeted manner because it is hard to tell if the speech is misleading. Professor Flynn said the unfortunate truth is that doctors can be incredibly influenced by requests of their patients. Direct-to-consumer advertising works. There is also substantial information showing that it is effective in promoting irrational prescribing habits. First, it has been proven to produce the uptake in patients of drugs that do more harm than good in some cases. He said he is very concerned about the marketing of supplements that have no doctor involved. He pointed out that such items would be a very legitimate focus of the bill. Other evidence of irrational prescribing behaviors include: Higher prices than would be needed otherwise; substituting newer drugs for older drugs, even though the drugs have more risks; the possible increase in public health risks, which is a legitimate interest of the state.

As for the preemption issue, Professor Flynn explained that COPPA provides that state legislation must not be inconsistent with COPPA. The way the Supreme Court has read

"inconsistent preemption" provisions in other statutes allows states to go beyond what is in the federal law, as long as it is possible to comply with both. If one cannot comply with both laws at the same time, then the state law is inconsistent with the federal law and the state law is preempted. COPPA does not include the terminology that creates "field preemption." Avoiding preemption is a good reason to follow COPPA as closely as possible.

Professor Flynn provided the citation for the First Circuit decision upholding the New Hampshire data mining law, IMS Health Inc. and Verispan, LLC v. Ayotte, in which he filed an amicus brief, and a link to his brief as counsel in the Second Circuit litigation challenging the Vermont health care information confidentiality law: IMS Health Incorporated, Verispan, LLC, Source Healthcare Analytics, Inc., a subsidiary of Wolters Kluwer Health, Inc., and Pharmaceutical Research And Manufacturers Of America v. Sorrell, Douglas and Hoffman. These documents are posted on the Judiciary Committee's webpage: http://www.maine.gov/legis/opla/judcommreview.htm.

The Judiciary Committee adjourned for the day.

2. Judiciary Committee Work Session

On Friday, October 16th, the Judiciary Committee convened and summarized the discussion from the previous day. The overnight break had given everyone an opportunity to review the additional written comments provided to the Committee. Assistant Attorney General Taub helped the members explore the proposals Profession Flynn had suggested. Mr. Taub asserted that the First Amendment still applies to direct communications, but the fact that the speech is coercive, targeted and one-on-one tips the balance in favor of State regulation. He also cautioned the Committee about underestimating the Commerce Clause challenge; a possible solution may be to create an affirmative defense that an entity can rely on locational programs or other factors.

The Judiciary Committee agreed that the intent of Chapter 230 was very good, but the members recognized that a change or complete repeal of the statute was necessary. Senator Schneider encouraged the Committee to keep as much of the law on the books as possible, perhaps repealing the private right of action, which had been identified the day before as the provision causing the greatest concern. The Committee discussed whether repealing the enforcement provisions immediately, while the rest of the law was reworked, would be a viable alternative to outright repeal. Mr. Emmert of Reed-Elsevier expressed his concern that public records custodians would abide by the prohibition in the law, notwithstanding the fact that the enforcement provisions were gone, and would not provide public records that could include minors' personal information. Because the company's business relies on regular access to those records, Mr. Emmert indicated that Reed-Elsevier may feel the need to file suit against the State once again if the records were not made available.

The Judiciary Committee discussed the various elements, the State's interest in protecting minors' information and the constitutional and preemption questions. The members also reviewed the options for moving forward, and agreed to submit a report to the Presiding Officers that includes findings and recommendations. The members stated that the record of information presented so far should be preserved as a foundation for the Legislature's further action.

The Committee developed findings and recommendations. See Part IV and Part V.

B. Information

1. Existing state and federal laws

a. The Children's Online Privacy Protection Act (COPPA)

The Children's Online Privacy Protection Act (COPPA) was enacted in 1998 to protect the privacy of children under the age of 13 using the Internet. The rule adopted by the Federal Trade Commission (FTC) to implement COPPA became effective April 21, 2000. Operators of websites or online services that are directed to children under age 13 and operators of websites who collect personal information on children even though children are not the targeted audience are required to comply with the COPPA rule.

The COPPA rule defines "personal information" as individually identifiable information about an individual collected online, including:

(a) A first and last name;

(b) A home or other physical address including street name and name of a city or town;

(c) An e-mail address or other online contact information, including but not limited to an instant messaging user identifier, or a screen name that reveals an individual's e-mail address;

(d) A telephone number;

(e) A Social Security Number;

(f) A persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information; or a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting; or

(g) Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition.

(16 CFR §312.2)

COPPA prohibits unfair or deceptive practices relating to the collection, use or disclosure of personal information about children using the Internet by requiring an operator to:

1. Provide notice on the website of what information is collected from children, how it's used and disclosure practices for the information;
2. Obtain verifiable parental consent prior to collection, use or disclosure of personal information from children;
3. Provide means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance of the information;
4. Not condition a child's participation in a game or activity or eligibility for a prize on the child disclosing more personal information than is reasonably necessary; and
5. Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

(15 U.S.C. §6502)

Enforcement: The FTC has the authority to bring enforcement actions and impose civil penalties for violations of the COPPA rule in a manner similar to other FTC rules prohibiting unfair and deceptive acts or practices. In addition COPPA authorizes a state Attorney General to enforce the rule by filing an action in federal court with written notice to the FTC of this action. (15 U.S.C. §6505)

Safe Harbors: The COPPA rule establishes criteria and a process for approval of self-regulatory programs referred to as "safe harbors."(15 U.S.C. §6503) An operator who complies fully with an FTC-approved safe harbor program is deemed to be in compliance with the COPPA rule. FTC's main goals in including the safe harbor provisions were to:

1. Encourage self regulation on the belief that industry can more quickly respond to changing technology and markets, and industry and consumer needs than the traditional rulemaking process; and
2. Reward good faith efforts to comply with COPPA.

Mandatory Rules Review by FTC: As required by COPPA, the FTC began a review of COPPA's implementation within 5 years of the rule's effective date. The FTC was specifically directed to examine:

- Practices relating to the collection and disclosure of information relating to children;
- Children's ability to access information of their choice online; and
- The availability of websites directed to children.

This review culminated in a report to Congress in 2007: Implementing the Children's Online Privacy Protection Act, A Report to Congress, Federal Trade Commission, 2007. The FTC solicited public input during the course of the review. The report paraphrased most who commented as stating that "the Rule requirements have struck an appropriate balance between protecting children's personal information online and preserving their ability to access content."

While acknowledging concerns regarding age falsification by children, the reliability of parental consent verification and the growing popularity of social networking sites among pre-teens, the FTC found that COPPA and the implementing rule have increased parental involvement with their children's use of the internet and provided clear standards for operators to protect children's privacy and safety online. The 2007 report concluded that the Rule should be retained without modification.

Links
U.S. Code, Title 15, Chapter 91, Sections 6501 - 6506
http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00006501----000-.html

Code of Federal Regulations, Title 16, Part 312, Sections 312.1- 312.12
http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title16/16cfr312_main_02.tpl

b. Federal Health Information Portability and Accountability Act of 1996 (HIPAA)
Pub. L. No. 104-191

The Health Insurance Portability and Accountability Act of 1996 (P.L.104-191) (HIPAA) was enacted in 1996. Title II of HIPAA requires the establishment of national standards for electronic health care transactions and national identifiers for providers, health insurance plans and employers. This is intended to help people keep their information private. Title II also addresses the security and privacy of health data. The standards are meant to improve the efficiency and effectiveness of the nation's health care system by encouraging the widespread use of electronic data in the United States health care system.

The Privacy Rule, issued by the federal Department of Health and Human Services, provides federal protections for personal health information held by covered entities and gives patients an array of rights with respect to that information. The Privacy Rule permits the disclosure of personal health information needed for patient care and other important purposes. The Privacy Rule applies only to covered entities. Individuals, organizations and agencies that meet the definition of a covered entity under HIPAA must comply with the Privacy Rule's requirements to protect the privacy of health information and must provide individuals with certain rights with respect to their health information. If an entity is not a covered entity, it does not have to comply with the Privacy Rule. The following are covered entities:

- Health Care Providers: This includes providers such as doctors, clinics, psychologists, dentists, chiropractors, nursing homes and pharmacies, but only if they transmit any information in an electronic form in connection with a transaction for which HHS has adopted a standard;
- Health Plans: This includes health insurance companies, HMOs, company health plans, government programs that pay for health care, such as Medicare, Medicaid and the military and veterans health care programs; and
- Health Care Clearinghouses: This includes entities that process nonstandard health information they receive from another entity into a standard (i.e., standard electronic format or data content), or vice versa.

Protected Health Information. The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral. The Privacy Rule calls this information "protected health information (PHI)."

"Individually identifiable health information" is information, including demographic data, that relates to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number). The Privacy Rule excludes from protected health information employment records that a covered entity maintains in its capacity as an employer and education and certain other records subject to, or defined in, the Family Educational Rights and Privacy Act, 20

U.S.C. §1232g.

De-Identified Health Information. There are no restrictions on the use or disclosure of de-identified health information. De-identified health information neither identifies nor provides a reasonable basis to identify an individual. There are two ways to de-identify information; either: 1) a formal determination by a qualified statistician; or 2) the removal of specified identifiers of the individual and of the individual's relatives, household members and employers is required, and is adequate only if the covered entity has no actual knowledge that the remaining information could be used to identify the individual.

Source: http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html

c. Gramm-Leach-Bliley Act

The Financial Services Modernization Act of 1999 (Pub.L. 106-102, 113 Stat. 1338), also know as the Gramm-Leach-Bliley Act (GLBA), requires banks and credit unions, finance companies, insurance companies and investment firms to send consumers a notice regarding their privacy rights. In the notices, the companies must tell consumers what information they collect about individuals and with whom they share that information. Further, they must offer consumers an opportunity to "opt-out" of having the information shared beyond exceptions provided by law. There are certain uses of nonpublic personal information for ordinary business purposes that are exceptions to the "opt out" right. These are often described in generic terms in privacy notices, using language such as "disclosures permitted by law." For example, personal information about a consumer may be disclosed to carry out a transaction the consumer has requested, to service the consumer's account, to prevent fraud, as part of an examination by regulators, or to an auditor, rating agency or prospective buyer of the institution. In addition, information other than health information may be shared within the corporate family or under joint marketing agreements with other institutions. In all these cases, the third party receiving the personal information must protect its confidentiality and may not use or disclose the information for other purposes. Banks, credit unions, mortgage companies, finance companies, insurance companies, insurance agents and investment firms are all subject to Gramm-Leach-Bliley. The law also applies to some retailers and automobile dealers that collect and share information about consumers to whom they extend credit or for whom they arrange credit.

d. Maine Insurance Information and Privacy Act (24-A MRSA §§2201-2220)

Because insurance business requires a more extensive use of sensitive personal information than most other financial services, the Maine Insurance Information and Privacy Protection Act provides some additional consumer protections. These protections currently apply to all consumer lines of insurance.

- In addition to health information, information about character, personal habits, style of living or general reputation may not be disclosed to non-affiliated third parties for marketing purposes without the consumer's written consent.
- The consumer has the right to obtain access to recorded personal information that the regulated insurance entity has, to request correction if the consumer thinks the

information is inaccurate, and to add a rebuttal statement to the file if there is a dispute between the consumer and the insurance company.

- The consumer also has the right to know the reasons why a company made an unfavorable decision when they reviewed application for insurance.

e. Maine Insurance Code - Trade Practices and Frauds (24-A §§2151-2187)

The purpose of the Trade Practices and Frauds chapter in the Maine Insurance Code is stated in section 2151: to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945, Public Law 15, 79th Congress, by defining or providing for the determination of all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices, by defining or providing for the determination of all such practices in other states by residents of this State which constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so defined or determined. Title 24-A, §2169-A protects the confidentiality of insurance information obtained by lenders. If a lender or creditor requires a purchaser or borrower to provide insurance information in connection with the extension of credit, an insurance agent or broker affiliated with that lender or creditor may not later use the information obtained to solicit or offer insurance directly to the purchaser or borrower. "Insurance information" means copies of insurance policies, binders, rates and expiration dates not otherwise in the possession of the agent or broker. An insurance agent or broker affiliated with a lender or creditor may use the insurance information obtained from the purchaser or borrower to solicit or offer insurance to the customer if the customer consents in writing to the use of the information. A lender or creditor may exchange insurance information with its affiliates as permitted under the Fair Credit Reporting Act pursuant to Title 10, chapter 210 or 15 United States Code, Chapter 41. Title 24-A, §2171 prohibits the mortgagee or lender from selling, transferring or otherwise disclosing or using any and all such insurance information to the mortgagee's or lender's own advantage and to the detriment of either the borrower, purchaser, mortgagor, insurer or company or agency complying with the requirements relating to insurance.

f. Maine data breach law (10 MRSA c. 210-B)

The Notice of Risk to Personal Data Act ("data breach law") has been effective since January 1, 2006. The data breach law requires information brokers and others to notify customers when unauthorized persons obtain personal data that could result in identity theft. A recent amendment effective September 12, 2009 makes illegal an unauthorized person's release or use of information acquired through a security breach. The amendment also clarifies how quickly affected persons must be notified after law enforcement determines that notification would not compromise a criminal investigation.

The data breach law covers information brokers and other persons who maintain computerized data that includes personal information. An information broker, for a fee, collects, assembles, evaluates, compiles, reports, transmits, transfers or communicates other individuals' information primarily to third parties. The definition of "person" includes individuals and business entities, as well as Maine government agencies, the University of Maine System, the Maine Community College System, Maine Maritime

Academy and private colleges and universities.

The data breach law prohibits an unauthorized person from releasing or using an individual's personal information acquired through a data security breach.

Personal information is an individual's first name or first initial and last name in combination with any one or more of the following information:

1. Social Security Number;
2. Driver's license number or state identification card number;
3. Account number, credit card number or debit card number, if circumstances exist wherein such a number could be used without additional identifying information, access codes or passwords; and
4. Account passwords or personal identification numbers or other access codes.

This definition applies if either the name or the other information is not encrypted or redacted. The other information need not appear with a person's first name or first initial and last name. The other information meets the statute's definition if someone else could use it fraudulently to assume or attempt to assume the identity of that person. Personal information does not include publicly available information that is lawfully made available to the general public from federal, state or local government records or widely distributed media. Personal information also does not include information from third-party claims databases maintained by property and casualty insurers.

Violations of the data breach law are civil violations. An enforcing agency at the Department of Professional and Financial Regulation, or if applicable the Attorney General, may seek to impose a fine of up to $500 per violation for each day the person violates the law, equitable relief, or an injunction against further violations of the data breach law. The maximum fine is $2,500. The fine does not apply to Maine Government, the University of Maine System, the Maine Community College System or Maine Maritime Academy.
Source: http://www.maine.gov/pfr/insurance/faq/data_breach_faq.doc

g. Maine Uniform Deceptive Trade Practices Act (10 MRSA c. 206)

The Maine Uniform Deceptive Trade Practices Act prohibits 12 specific practices, plus conduct likely to create confusion or misunderstanding to a consumer, unfair methods of competition, and unfair or deceptive acts or practices. The transaction must be conducted in trade or commerce for the statute to apply. The attorney general's office may enforce the statute for violations by a business.

The Act provides a private remedy to persons likely to suffer harm for conduct involving either misleading identification of business or goods or false or deceptive advertising. Proof of monetary damage, loss of profits or intent to deceive is not required. The court in exceptional cases may award reasonable attorneys' fees to the prevailing party. Costs or attorneys' fees may be assessed against a defendant only if the court finds that the defendant has willfully engaged in a deceptive trade practice. The deceptive trade practices addressed by the Act can be roughly subdivided into conduct involving either misleading trade identification or false or deceptive advertising.

h. Maine Unfair Trade Practices Law (5 MRSA c. 10)

The Maine Unfair Trade Practices Act (UTPA) is a consumer's basic remedy against any unfair or deceptive trade practices by a business. Consumers can bring their own private UTPA actions for relief in either Small Claims Court, District Court or Superior Court. To do so, a consumer must prove both: 1) a loss of money or property as the result of a violation of the UTPA: and 2) the transaction primarily involved a personal, family or household purpose. If a consumer cannot prove a specific loss of money or property, then UTPA remedies are not available.

The FTC has stated that illegal deception occurs if there has been "a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." Representations are deceptive if necessary qualifications are not made, or if these disclosures or qualifications are too inconspicuous (e.g., too small print or too quick statement). A trade practice can be unfair or deceptive even if the business had no intent to deceive. The standards of proof in an unfair trade practices suit are considerably more lenient than an action in tort for fraudulent misrepresentation.

Often, when enacting a statute that prohibits a particular commercial practice, the Maine Legislature will expressly state that violation of that statute is a violation (or is prima facie or presumptive evidence of a violation) of the Unfair Trade Practices Act. In addition, if the Legislature has enacted specific consumer protection statutes (e.g., the creation of Boards regulating such professions as lawyers, doctors, real estate brokers, plumbers, electricians, etc., then a violation of such a statute or rules adopted pursuant to it can be used as persuasive evidence that the consumer has also been a victim of a violation of the Unfair Trade Practices Act. The Attorney General can also adopt legally enforceable rules that define acts that are evidence of an unfair trade practice. Currently, the Attorney General has issued rules regulating Lemon Law arbitration, the sale of home heating oil and the sale of new cars.

i. Maine health information privacy laws: 22 MRSA §1711-C and §1711-E

- Title 22 §1711-C provides that health care information is confidential and may not be disclosed by health facilities without the written consent of the individual. "Health care" means preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, treatment, procedures or counseling, including appropriate assistance with disease or symptom management and maintenance, that affects an individual's physical, mental or behavioral condition, including individual cells or their components or genetic information, or the structure or function of the human body or any part of the human body. Health care includes prescribing, dispensing or furnishing to an individual drugs, biologicals, medical devices or health care equipment and supplies; providing hospice services to an individual; and the banking of blood, sperm, organs or any other tissue. The law prohibits the sale or marketing of medical information by a health care practitioner or facility without written or oral authorization for the disclosure. The law excludes information that protects the anonymity of the individual by means of encryption or encoding of individual identifiers or information pertaining to or derived from federally sponsored,

authorized or regulated research governed by 21 Code of Federal Regulations, Parts 50 and 56 and 45 Code of Federal Regulations, Part 46, to the extent that such information is used in a manner that protects the identification of individuals.

- Title 22 §1711-E authorizes the State to establish a system by which Maine-licensed prescribers may register to seek protection of the privacy of their prescription drug information from use for drug marketing. The statute also provides for a fee on drug companies and labelers to fund the program. The State currently is unable to enforce the confidentiality provisions of the statute because enforcement has been preliminarily enjoined by the Federal District Court in Maine, a decision that the State has appealed. A final determination on the legality of the statute has not been reached, and registration of prescribers and Maine's enforcement of the fee are permitted to continue by the terms of the injunction. The State's brief to the First Circuit is posted on the Judiciary Committee's webpage.

  Source: http://www.state.me.us/dhhs/boh/manufacturer_laws_fees.htm

j. Federal and Maine Laws Governing Information Collection and Marketing to Consumers by Pharmaceutical Companies (compiled and provided by PhRMA)

Federal Statutes

- Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§6501-6506 (2006) (regulating online collection, use and disclosure of personal information from children under age 13)
- Controlled Substances Act, 21 U.S.C. §801 et seq. (2006) (governing the manufacture, importation, possession, use and distribution of certain controlled substances, including many pharmaceuticals)
- Federal Food, Drug and Cosmetic Act of 1938 (FDCA), 21 U.S.C. §301 et seq. (2006), (granting FDA authority to oversee the efficacy and safety of pharmaceutical products, including the regulation of advertising and labeling, among other authorities)
- Federal Trade Commission Act of 1914, 15 U.S.C. §§41-58 (2006) (prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce)
- Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §201 et seq. and §1320d et seq. (2006) (restricting the collection and use of certain individually-identifiable health information, among other provisions)
- Health Information Technology for Economic and Clinical Health (HITECH) Act, 42 U.S.C. §201 et seq. (2009) (applying certain HIPAA responsibilities directly to business associates, among other provisions)
- Medicare and Medicaid Patient Protection Act of 1987 (Anti-Kickback Statute), 42 U.S.C. §1320a-7b(b) (2006) (imposing criminal penalties for certain acts involving federally-funded health care programs, including the knowing and willful solicitation or receipt of payment to induce an entity to use an item or service that may be covered by such a program)
- Prescription Drug Marketing Act of 1987, amended by the Prescription Drug

Amendments of 1992, 21 U.S.C. §353 (2006) (establishing legal safeguards to ensure safe prescription drug distribution) (incorporated in the FDCA)

Federal Regulations

- Children's Online Privacy Protection Rule, 16 CFR §§312.1-.12 (2009) (implementing COPPA's requirements concerning the online collection, use and disclosure of personal information from children under age 13)
- Controlled Drugs, 21 CFR §§1300-1399 (2009) (requirements for controlled substances)
- General Labeling Provisions, 21 C.F.R. §201 (2009) (regulating drug labeling)
- HIPAA Privacy Rule, 45 C.F.R. pts. 160 & 164, subpts. A & E (2009) (implementing HIPAA privacy provisions, including restrictions related to marketing)
- Medication Guides for Prescription Drug Products, 21 C.F.R. §208 (2009) (requirements for patient labeling for human prescription drug products)
- Prescription Drug Advertising, 21 C.F.R. §202 (2009) (requirements for prescription drug advertising)
- Prescription Drug Marketing, 21 C.F.R. §203 (2009) (implementing the Prescription Drug Marketing Act of 1987 and the Prescription Drug Amendments of 1992)

Maine Laws

- Confidentiality of Health Care Information, 22 MRSA §1711-C (2008) (establishing that an individual's health care information is confidential and may not be disclosed other than to the individual by the health care practitioner or facility, with certain exceptions).
- Confidentiality of Prescription Drug Information, 22 MRSA §1711-E (2008) (restricting the use of patient-identifiable and prescriber-identifiable prescription information for marketing purposes).
- Drug Marketing Costs, 22 MRSA §2698-A (2008) (requiring a manufacturer or labeler of prescription drugs dispensed in Maine that employs, directs or utilizes marketing representatives in Maine to report marketing costs for prescription drugs).
- Unfair Trade Practices Act, 5 MRSA §§205A-214 (2008) (prohibiting unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce).
- Uniform Deceptive Trade Practices Act, 10 MRSA §§1211-1216 (2008) (providing that an entity may not, in the course of business, engage in conduct that creates a likelihood of confusion or misunderstanding).

2. Relevant cases

- IMS Health, Inc. v. Ayotte, 490 F. Supp. 2d 163 (D.N.H. 2007), rev'd, 550 F.3d 42 (1st Cir. 2008), cert. denied, 129 S. Ct. 2684 (2009)

Plaintiffs, which are in the business of harvesting, refining and selling prescriber-identifiable data to the pharmaceutical industry, challenged the New Hampshire "Prescription Confidentiality Act," a law that prohibits the sale or use of prescription drug data for certain commercial purposes. On April 30, 2007, the New Hampshire Federal District Court held that the state law violated the First Amendment because the law improperly restricted the commercial speech

rights of data brokers and pharmaceutical companies. The State of New Hampshire appealed the decision to the First Circuit Court of Appeals, and on November 18, 2008, the First Circuit Court reversed the lower court and held in New Hampshire's favor. The First Circuit held that: 1) the New Hampshire law principally regulated conduct, not speech; and 2) even assuming the law did implicate the First Amendment, it satisfied the Supreme Court's test for regulation of commercial speech. It also rejected the plaintiff's other constitutional challenges to New Hampshire's law, ruling that it was not void-for-vagueness or overbroad and did not violate the dormant Commerce Clause. The United States Supreme Court denied plaintiffs' petition for a writ of *certiorari* on June 29, 2009.

- IMS Health, Inc. v. Sorrell, 2009 U.S. Dist. LEXIS 35594, (D. Vt. Apr. 23, 2009)

Vermont's law regulating the use of prescription drug data when used for certain marketing or commercial purposes includes an "opt-in" feature (the default in Vermont is a prohibition on the sale or use) and also imposes disclosure requirements on a drug company's sales representatives. Vermont's law prohibits pharmacies and other "covered entities" (a defined term that does not include so-called "data miners") from selling or using prescriber-identifiable data for marketing or promoting prescription drugs unless the prescriber consents. The law also prohibits drug manufacturers and drug marketers from using prescriber-identifiable data for marketing prescription drugs unless the prescriber consents. The Vermont Federal District Court upheld the Vermont law, and it is currently on appeal to the Second Circuit Court of Appeals.

- IMS Health, Inc. v. Rowe, 532 F. Supp. 2d 153 (D. Me. 2008), on appeal to the First Circuit Court of Appeals as IMS Health Inc. v. Mills.

The Maine Prescription Privacy Law (22 MRSA §1711-E) prohibits the sale or use of prescription drug data for marketing purposes when the prescriber has elected to keep that data from being used in that fashion. The Maine Federal District court held that the law violated the First Amendment because it improperly restricted the commercial speech rights of data brokers and pharmaceutical companies. The case is currently on appeal to the First Circuit Court of Appeals.

Selected documents from the above three cases are posted on the Judiciary Committee's webpage: http://www.maine.gov/legis/opla/judcommreview.htm.

3. Related studies, research and other information provided to the Judiciary Committee

Jeff Chester, Executive Director of the Center for Digital Democracy, cited several resources for information about interactive marketing and consumer privacy. His written testimony is posted on the Judiciary Committee's webpage.
http://www.maine.gov/legis/opla/judcommrevJeffChester.pdf

- Edward Landry, Carolyn Ude, and Christoper Vollmer, "HD Marketing 2010: Sharpening the Conversation," Booz/Allen/Hamilton, ANA, IAB, AAAA, 2008, http://www.boozallen.com/media/file/HD_Marketing_2010.pdf (viewed 12 Oct. 2009)

- David Hallerman, "Behavioral Targeting: Marketing Trends," eMarketer, June 2008, pp. 2, 11.

- For a useful online illustration on the data collection and targeting capabilities of online ad networks, see Advertising Age's "Ad Networks+ Exchanges Guide. 2009. http://brandedcontent.adage.com/adnetworkguide09/lobby.php?id=2

- "The Rise of Onsite Behavioral Targeting," http://www.omniture.com/offer/281.

- Platform A/AOL, "Behavioral Targeting for Pharmaceutical Marketers," 2006, personal copy

- F. M. Leslie, L. J. Levine, S. E. Loughlin, and C. Pechman, "Adolescents' Psychological & Neurobiological Development: Implications for Digital Marketing," Memo prepared for the Second NPLAN/BMSG Meeting on Digital Media and Marketing to Children for the NPLAN Marketing to Children Learning Community, Berkeley, CA, June 29–30, 2009, p. 1.

- L. Moses, "Research on Child Development: Implications for How Children Understand and Cope with Digital Marketing," Memo prepared for the Second NPLAN/BMSG Meeting on Digital Media and Marketing to Children for the NPLAN Marketing to Children Learning Community, Berkeley, CA, June 29–30, 2009, p. 5.

- Jeff Chester and Kathryn C. Montgomery, "Interactive Food & Beverage Marketing: Targeting Children and Youth in the Digital Age," Berkeley Media Studies Group, May 2007, http://www.digitalads.org/documents/digiMarketingFull.pdf (viewed 13 Oct. 2008).

- Brian Knutson, Scott Rick, G. Eliot Wimmer, Drazen Prelec, and George Loewenstein, "Neural Predictors of Purchases," Neuron 53: 147–156; Alain Dagher, "Shopping Centers in the Brain," Neuron 53: 7–8.

- Nairn, A. (2009). Changing the Rules of the Game: Implicit Persuasion and Interactive Children's

- Marketing. Memo prepared for the Second NPLAN/BMSG Meeting on Digital Media and Marketing to Children for the NPLAN Marketing to Children Learning Community, Berkeley, CA, June 29–30, 2009, p. 1.

- Leslie, et al., "Adolescents' Psychological & Neurobiological Development: Implications for Digital Marketing."

- Betawave, "Ad Solutions," http://betawave.com/audiences/teens.html (viewed 12 Oct. 2009).

Dr. Janis B. Petzel, M.D. cited sources for information about neuromarketing. Her testimony is posted on the Judiciary Committee's webpage: http://www.maine.gov/legis/opla/judcommrevJanisPetzelMEAssnPsychiatricPhysicians_.pdf

- Wilson RM et A.; Neuromarketing and Consumer Free Will, J. of Consumer Affairs 42 (3); 389-410.

- www.consumersunion.or/pub/core_health_care/004316.html

Associate Professor Kevin Outterson, Boston University School of Law, included many sources of information with his submitted written testimony. His entire testimony is included on the Judiciary Committee's webpage:
http://www.maine.gov/legis/opla/judcommrevTestimonyKevinOutterson.pdf

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- Nicola Evans, Arthur Farkas, Elizabeth Gilpin, Charles Berry, John P. Pierce, Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking, Journal of the National Cancer Institute, 1995; 87:1538-1545

- L Henriksen, A L Dauphinee, Y Wang, S P Fortmann, Industry sponsored anti-smoking ads and adolescent reactance: test of a boomerang effect, Tobacco Control 2006;15:13–18.

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- George Koroneos, Hard of (Ad)hering, PharmExec.com. August 1, 2008, http://pharmexec.findpharma.com/pharmexec/Rotating+Feature+Article/Hard-of-Adhering/ArticleStandard/Article/detail/533844

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- Lesley A Smith and David R Foxcroft, Research article: The effect of alcohol advertising, marketing and portrayal on drinking behavior in young people: systematic review of prospective cohort studies, BMC Public Health 2009, 9:51, http://www.biomedcentral.com/1471-2458/9/51

- Diane M. Straub, M.D., M.P.H., Nancy K. Hills, M.A., Pamela J. Thompson, M.P.H., And Anna-Barbara Moscicki, M.D., Effects of Pro- and Anti-Tobacco Advertising on Nonsmoking Adolescents' Intentions to Smoke, Journal Of Adolescent Health 2003;32:36–43 1054-139X/

- Robin Strongin, FDA Gets Social: Considers Regulating Social Media for Drugs and Devices, September 24th, 2009, http://www.disruptivewomen.net/2009/09/24/fda-gets-social-considers-regulating-social-media-for-drugs-and-devices/

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- A Generation Unplugged, Research Report, September 12, 2008, http://www.harrisinteractive.com/News/MediaAccess/2008/HI_TeenMobileStudy_ResearchReport.pdf

- Viewpoint: Marketing to Teens Online, BusinessWeek, November 7, 2007

- Michelle Foster, BA, Internet Marketing through Facebook: Influencing Body Image in Teens and Young Adults, http://www.selfhelpmagazine.com/article/facebook

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IV. FINDINGS

The Judiciary Committee makes the following findings.

1. There are clearly concerns with a number of marketing efforts by some companies using the Internet to gather information. Information is gathered without clear notice that it will be used for marketing purposes or transferred to a separate entity for marketing or other purposes. Research in this area continues to develop more effective marketing techniques that rely on the provision of personal information and the indication of personal preferences. There is evidence that teenagers are particularly vulnerable to targeted data collection and marketing, and do not have the cognitive skills to routinely make appropriate decisions about providing information. The Judiciary Committee finds that the State of Maine has a compelling interest in protecting minors from inappropriate data collection, data transfer and data use.

2. LD 1183, originally titled, An Act To Prevent Predatory Marketing Practices against Minors Regarding Data Concerning Health Care Issues, primarily focused on the transfer of health care information of minors via the Internet. There was enthusiastic support for the bill and its intent. The information provided to the Business, Research and Economic Development Committee provided sufficient justification for moving forward with protections for minors with regard to the collection and use of health-related information.

3. The changes adopted by the Business, Research and Economic Development Committee and then the Legislature as a whole, although intended to make the proposed law more consistent with some of the provisions of the Children's Online Privacy Protection Act, unintentionally expanded the scope beyond what opponents assert is constitutional. Parties who believe their activities are affected by Public Law 2009, Chapter 230 have challenged the law in Federal Court and will do so again if the offensive provisions are not amended or removed completely.

4. Restrictions on the transfer or resale of any information collected may withstand constitutional attack. This area of law is evolving quickly as the federal courts address various states' statutes that regulate the conduct surrounding information collection and transfer.

5. In its two days of hearings and work sessions, the Judiciary Committee was unable to develop an adequate way to amend existing legislation to remedy the constitutional and preemption issues without a more comprehensive overhaul.

V. RECOMMENDATIONS

Based on the testimony provided in written form and at the public hearing, and on the discussions among the members and with the Attorney General and other interested parties, and following the findings already delineated, the Judiciary Committee makes the following recommendations.

1. The Judiciary Committee recommends that the Legislative Leadership allow an after-deadline bill to repeal the law to avoid further lawsuits against the State.

2. The Judiciary Committee recommends consideration of legislation that includes restrictions on the transfer and resale of information. Close attention should be paid to litigation in which these questions are currently being explored.

3. The Judiciary Committee recommends that attention be paid to specific age limits in legislation addressing data collection and use. The Judiciary Committee is aware that the constitutional rights and interests of teens must be recognized and protected. Age limits in current laws provide guidance with regard to acceptable restrictions and protections.

4. The Judiciary Committee recommends that new legislation establish a cap on the amount of information that minors must provide in order to be eligible to receive a free prize or award, or a coupon or other savings on a product or service.

5. The Judiciary Committee recommends that any new legislation be drafted carefully to maintain consistency with the Children's Online Privacy Protection Act. State laws inconsistent with COPPA are explicitly preempted, but COPPA's provisions can also be instructive as to restrictions and protections that are acceptable to the range of parties interested in these concerns.

6. The Judiciary Committee recommends that new legislation addressing these concerns should be crafted as narrowly as possible. It is important that the Legislature specifically identify the conduct to be prohibited and the consequences to be prevented. Once the purpose of the law is precisely focused, the language can be drafted to address those concerns and to avoid spillover and unintended effects. A court is more likely to defer to a Legislature that has narrowly-tailored its statute.

7. The Judiciary Committee recommends that the Legislature ensure that new legislation be part of a process of thorough public hearings and the ability to make legislative findings. The federal litigation and the Judiciary Committee's process on the review of Public Law 2009, chapter 230 ensure that the interested parties are now on notice and will have no excuse not to participate in a robust discussion of the constitutional, legal and practical issues of any legislation that may be proposed on these issues.

APPENDIX A

LD 1183, Committee Amendment, PL 2009, c. 230

An Act To Prevent Predatory Marketing Practices against Minors Regarding Data Concerning Health Care Issues

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 10 MRSA c. 1055 is enacted to read:

CHAPTER 1055

MARKETING AND DATA COLLECTION PRACTICES

§ 9521. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Collect. "Collect" means to solicit, elicit or ask for, with or without any form of incentive or enticement.

2. Health-related information. "Health-related information" means any information about an individual or a member of the individual's family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or other similar data.

§ 9522. Unlawful collection and use of data from minors

1. Unlawful collection. A person may not collect or receive health-related information over the Internet or any wireless communications device from an individual who is in fact an unemancipated minor without the express written consent of that minor's parent or legal guardian.

2. Unlawful use. A person may not sell, offer for sale or otherwise transfer to another person health-related information about a minor obtained over the Internet or any wireless communications device if that information:

A. Was unlawfully collected pursuant to subsection 1;

B. Individually identifies the minor; or

C. Will be used in violation of section 9523.

§ 9523. Predatory marketing against minors prohibited

A person may not use any health-related information regarding a minor obtained over the Internet or any wireless communications device for the purpose of marketing a product or service to that minor or promoting any course of action for the minor relating to a product. Use of information in violation of this section constitutes predatory marketing.

§ 9524. Enforcement

1. Unfair trade practice. Violation of this chapter is an unfair trade practice as prohibited by Title 5, section 207. Each unlawful collection of data or unlawful predatory marketing event in violation of this chapter constitutes a separate violation. The Attorney General shall establish procedures for receiving and investigating complaints of violations of this chapter. The procedures may include the development of electronic forms, available over the Internet, by which a person may file a complaint with the Attorney General alleging a violation of this chapter.

2. Civil action; injunction and damages. Notwithstanding Title 5, section 213, a person about whom information is unlawfully collected or who is the object of predatory marketing in violation of this chapter may bring an action in an appropriate state court for either or both of the following:

A. An injunction to stop the unlawful collection or predatory marketing; and

B. Recovery of actual damages from each violation or up to $250 in damages for each violation, whichever is greater.

If the court finds there has been a violation of this chapter, the court shall award the petitioner reasonable attorney's fees and costs incurred in connection with the action.

If the court finds that the defendant willfully or knowingly violated this chapter, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under paragraph B.

3. Civil violation; penalty. Each violation of this chapter constitutes a civil violation for which a fine may be assessed of:

A. Up to $20,000 for a first violation; and

B. No less than $20,000 for a 2nd or subsequent violation.

SUMMARY

This bill addresses the current practices of persons using the Internet and other wireless communications devices, with or without promotional incentives, to acquire health-related information about minors and then using that information unscrupulously. Under this bill, it is unlawful to solicit or collect health-related information about a minor who is not emancipated without the express written consent of the minor's parent or guardian, to transfer any health-related information that identifies a minor or to use any of that information to market a product or service to a minor regardless of whether or not the information was lawfully obtained. Unlawful marketing includes promoting a course of action relating to a product. The bill provides 3 potential remedies for a violation: relief as an unfair trade practice, a private right of action and a civil violation with substantial monetary fines.

Amend the bill by striking out the title and substituting the following:

'An Act To Prevent Predatory Marketing Practices against Minors'

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'**Sec. 1. 10 MRSA c. 1055** is enacted to read:

CHAPTER 1055

MARKETING AND DATA COLLECTION PRACTICES

§ 9551. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Health-related information. "Health-related information" means any information about an individual or a member of the individual's family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or other similar data.

2. Marketing purposes. "Marketing purposes," with respect to the use of health-related information or personal information, means the purposes of marketing or advertising products, goods or services to individuals.

3. Person. "Person" includes an individual, firm, partnership, corporation, association, syndicate, organization, society, business trust, attorney-in-fact and every natural or artificial legal entity.

4. Personal information. "Personal information" means individually identifiable information, including:

A. An individual's first name, or first initial, and last name;

B. A home or other physical address;

C. A social security number;

D. A driver's license number or state identification card number; and

E. Information concerning a minor that is collected in combination with an identifier described in this subsection.

5. Verifiable parental consent. "Verifiable parental consent" means any reasonable effort, taking into consideration available technology, including a request for authorization for future collection, use and disclosure described in the notice, to ensure that a parent of a minor receives notice of the collection of personal information, use and disclosure practices and authorizes the collection, use

and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that minor.

§ 9552. Unlawful collection and use of data from minors

1. Unlawful collection. It is unlawful for a person to knowingly collect or receive health-related information or personal information for marketing purposes from a minor without first obtaining verifiable parental consent of that minor's parent or legal guardian.

2. Unlawful use. A person may not sell, offer for sale or otherwise transfer to another person health-related information or personal information about a minor if that information:

A. Was unlawfully collected pursuant to subsection 1;

B. Individually identifies the minor; or

C. Will be used in violation of section 9553.

§ 9553. Predatory marketing against minors prohibited

A person may not use any health-related information or personal information regarding a minor for the purpose of marketing a product or service to that minor or promoting any course of action for the minor relating to a product. Use of information in violation of this section constitutes predatory marketing.

§ 9554. Enforcement

1. Unfair trade practice. Violation of this chapter is an unfair trade practice as prohibited by Title 5, section 207. Each unlawful collection of data or unlawful predatory marketing event in violation of this chapter constitutes a separate violation. The Attorney General may establish procedures for receiving and investigating complaints of violations of this chapter. The procedures may include the development of electronic forms, available over the Internet, by which a person may file a complaint with the Attorney General alleging a violation of this chapter.

2. Civil action; injunction and damages. Notwithstanding Title 5, section 213, a person about whom information is unlawfully collected or who is the object of predatory marketing in violation of this chapter may bring an action in an appropriate state court for either or both of the following:

A. An injunction to stop the unlawful collection or predatory marketing; and

B. Recovery of actual damages from each violation or up to $250 in damages for each violation, whichever is greater.

If the court finds there has been a violation of this chapter, the court shall award the petitioner reasonable attorney's fees and costs incurred in connection with the action.

If the court finds that the defendant willfully or knowingly violated this chapter, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under paragraph B.

3. Civil violation; penalty. Notwithstanding the penalty provisions of Title 5, section 209, each violation of this chapter constitutes a civil violation for which a fine may be assessed of:

A. No less than $10,000 and no more than $20,000 for a first violation; and

B. No less than $20,000 for a 2nd or subsequent violation.

4. Application of federal law. If the Attorney General finds evidence of a violation of the federal Children's Online Privacy Protection Act of 1998, 15 United States Code, Sections 6501 to 6506 (2007), the Attorney General may bring a civil action pursuant to 15 United States Code, Section 6504 (2007).'

SUMMARY

This amendment changes the title of the bill. It adds new definitions for "person," "personal information," "marketing purposes" and "verifiable parental consent," removes the definition for "collect" and prohibits the knowing collection of both health-related and personal information from minors. It also removes the requirement for the Attorney General to establish procedures for complaints and instead allows the Attorney General to establish these procedures. It amends the provision that unlawful collection constitutes the collection of personal information obtained via the Internet or any wireless communications device to more broadly encompass the collection of this information by any method. It changes the penalty provision to clarify that, notwithstanding the provisions of the Maine Unfair Trade Practices Act, each violation constitutes a civil violation for which a fine may be assessed of no less than $10,000 and no more than $20,000 for a first violation and no less than $20,000 for a 2nd violation or any subsequent violation. It also provides that, if the Attorney General finds evidence of a violation of the federal Children's Online Privacy Protection Act of 1998, it may bring a civil action pursuant to 15 United States Code, Section 6504.

An Act To Prevent Predatory Marketing Practices against Minors

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 10 MRSA c. 1055 is enacted to read:

CHAPTER 1055
MARKETING AND DATA COLLECTION PRACTICES

§ 9551. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Health-related information. "Health-related information" means any information about an individual or a member of the individual's family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or other similar data.

2. Marketing purposes. "Marketing purposes," with respect to the use of health-related information or personal information, means the purposes of marketing or advertising products, goods or services to individuals.

3. Person. "Person" includes an individual, firm, partnership, corporation, association, syndicate, organization, society, business trust, attorney-in-fact and every natural or artificial legal entity.

4. Personal information. "Personal information" means individually identifiable information, including:

A. An individual's first name, or first initial, and last name;

B. A home or other physical address;

C. A social security number;

D. A driver's license number or state identification card number; and

E. Information concerning a minor that is collected in combination with an identifier described in this subsection.

5. Verifiable parental consent. "Verifiable parental consent" means any reasonable effort, taking into consideration available technology, including a request for authorization for future collection, use and disclosure described in the notice, to ensure that a parent of a minor receives notice of the collection of personal information, use and disclosure practices and authorizes the collection, use and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that minor.

§ 9552. Unlawful collection and use of data from minors

1. Unlawful collection. It is unlawful for a person to knowingly collect or receive health-related information or personal information for marketing purposes from a minor without first obtaining verifiable parental consent of that minor's parent or legal guardian.

2. Unlawful use. A person may not sell, offer for sale or otherwise transfer to another person health-related information or personal information about a minor if that information:

A. Was unlawfully collected pursuant to subsection 1;

B. Individually identifies the minor; or

C. Will be used in violation of section 9553.

§ 9553. Predatory marketing against minors prohibited

A person may not use any health-related information or personal information regarding a minor for the purpose of marketing a product or service to that minor or promoting any course of action for the minor relating to a product. Use of information in violation of this section constitutes predatory marketing.

§ 9554. Enforcement

1. Unfair trade practice. Violation of this chapter is an unfair trade practice as prohibited by Title 5, section 207. Each unlawful collection of data or unlawful predatory marketing event in violation of this chapter constitutes a separate violation. The Attorney General may establish procedures for receiving and investigating complaints of violations of this chapter. The procedures may include the development of electronic forms, available over the Internet, by which a person may file a complaint with the Attorney General alleging a violation of this chapter.

2. Civil action; injunction and damages. Notwithstanding Title 5, section 213, a person about whom information is unlawfully collected or who is the object of predatory marketing in violation of this chapter may bring an action in an appropriate state court for either or both of the following:

A. An injunction to stop the unlawful collection or predatory marketing; and

B. Recovery of actual damages from each violation or up to $250 in damages for each violation, whichever is greater.

If the court finds there has been a violation of this chapter, the court shall award the petitioner reasonable attorney's fees and costs incurred in connection with the action.

If the court finds that the defendant willfully or knowingly violated this chapter, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under paragraph B.

3. Civil violation; penalty. Notwithstanding the penalty provisions of Title 5, section 209, each violation of this chapter constitutes a civil violation for which a fine may be assessed of:

A. No less than $10,000 and no more than $20,000 for a first violation; and

B. No less than $20,000 for a 2nd or subsequent violation.

4. Application of federal law. If the Attorney General finds evidence of a violation of the federal Children's Online Privacy Protection Act of 1998, 15 United States Code, Sections 6501 to 6506 (2007), the Attorney General may bring a civil action pursuant to 15 United States Code, Section 6504 (2007).

Effective September 12, 2009

APPENDIX B

Memo from Presiding Officers to Judiciary Committee

Elizabeth H. Mitchell
President of the Senate

State of Maine
124th Maine Legislature

Hannah M. Pingree
Speaker of the House

MEMORANDUM

TO: Senator Lawrence Bliss
Representative Charles Priest
Chairs of the Judiciary Committee

FROM: Elizabeth Mitchell
President of the Senate

Hannah Pingree
Speaker of the House

DATE: September 9, 2009

RE: Judiciary Committee review of PL 2009, Chapter 230

We authorize the Legislature's Judiciary Committee to meet for 2 days in October for the purpose of reviewing questions that have been raised about PL 2009, Chapter 230, from LD 1183, "An Act To Prevent Predatory Marketing Practices against Minors Regarding Data Concerning Health Care Issues."

The law is designed to protect the personal information of children from being collected in an illicit manner and used by companies to target advertising. It appears the new law may also prevent legitimate marketing or publication of information on minors and their families. Concerns have been raised about the possibility that this law violates the first amendment rights of minors as well as the commerce clause, and is in conflict with existing federal laws to protect minors.

The Judiciary Committee should review the language of this legislation in light of the concerns raised by independent colleges, the Maine Press Association and others. The committee should identify how to best meet the original intent of the legislation of protecting minors from data collection on health care issues, and look at changes needed in the current law to achieve that goal.

APPENDIX C

U.S. District Court Order

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE INDEPENDENT COLLEGES ASSOCIATION, MAINE PRESS ASSOCIATION, NETCHOICE, AND REED ELSEVIER, INC.,	)	
Plaintiffs,	)	
v.	)	CV-09-396-B-W
GOVERNOR JOHN BALDACCI and ATTORNEY GENERAL JANET MILLS, in their official capacities, and JOHN DOE,	)	
Defendants.	)	

STIPULATED ORDER OF DISMISSAL

The Court finds that the Plaintiffs have met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment. The Attorney General has acknowledged her concerns over the substantial overbreadth of the statute and the implications of Chapter 230 on the exercise of First Amendment rights and accordingly has committed not to enforce it. She has also represented that the Legislature will be reconsidering the statute when it reconvenes. As a result, third parties are on notice that a private cause of action under Chapter 230 could suffer from the same constitutional infirmities.

In light of these considerations, the parties have agreed to a dismissal of this action without prejudice and the Court hereby SO ORDERS.

/s/John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 9th day of September, 2009

APPENDIX D

Text of COPPA and COPPA Rule

Children's Online Privacy Protection Act of 1998

TITLE XIII-CHILDREN'S ONLINE PRIVACY PROTECTION

SEC. 1301. SHORT TITLE.

This title may be cited as the "Children's Online Privacy Protection Act of 1998".

SEC. 1302. DEFINITIONS.

In this title:

(1) CHILD.—The term "child" means an individual under the age of 13.

(2) OPERATOR.—The term "operator"—

> (A) means any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, involving commerce—
>
> > (i) among the several States or with 1 or more foreign nations;
> >
> > (ii) in any territory of the United States or in the District of Columbia, or between any such territory and—
> >
> > > (I) another such territory; or
> > >
> > > (II) any State or foreign nation; or
> >
> > (iii) between the District of Columbia and any State, territory, or foreign nation; but
>
> (B) does not include any nonprofit entity that would otherwise be exempt from coverage under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

(3) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(4) DISCLOSURE.—The term "disclosure" means, with respect to personal information—

> (A) the release of personal information collected from a child in identifiable form by an operator for any purpose, except where such information is provided to a person other than the operator who provides support for the internal operations of the website and does not disclose or use that information for any other purpose; and
>
> (B) making personal information collected from a child by a website or online service directed to children or with actual knowledge that such information was collected from a child, publicly available in identifiable form, by any means including by a public posting, through the Internet, or through—
>
> > (i) a home page of a website;
> >
> > (ii) a pen pal service;
> >
> > (iii) an electronic mail service;

(iv) a message board; or

(v) a chat room.

(5) FEDERAL AGENCY.—The term "Federal agency" means an agency, as that term is defined in section 551(1) of title 5, United States Code.

(6) INTERNET.—The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/ Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(7) PARENT.—The term "parent" includes a legal guardian.

(8) PERSONAL INFORMATION.—The term "personal information" means individually identifiable information about an individual collected online, including—

(A) a first and last name;

(B) a home or other physical address including street name and name of a city or town;

(C) an e-mail address;

(D) a telephone number;

(E) a Social Security number;

(F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual; or

(G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.

(9) VERIFIABLE PARENTAL CONSENT.—The term "verifiable parental consent" means any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child.

(10) WEBSITE OR ONLINE SERVICE DIRECTED TO CHILDREN.—

(A) IN GENERAL.—The term "website or online service directed to children" means—

(i) a commercial website or online service that is targeted to children; or

(ii) that portion of a commercial website or online service that is targeted to children.

(B) LIMITATION.—A commercial website or online service, or a portion of a commercial website or online service, shall not be deemed directed to children solely for referring or linking to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.

(11) PERSON.—The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

(12) ONLINE CONTACT INFORMATION.—The term "online contact information" means an e-mail address or an-other substantially similar identifier that permits direct contact with a person online.

SEC. 1303. REGULATION OF UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN CONNECTION WITH THE COLLECTION AND USE OF PERSONAL INFORMATION FROM AND ABOUT CHILDREN ON THE INTERNET.

(a) ACTS PROHIBITED.—

(1) IN GENERAL.—It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under subsection (b).

(2) DISCLOSURE TO PARENT PROTECTED.—Notwithstanding paragraph (1), neither an operator of such a website or online service nor the operator's agent shall be held to be liable under any Federal or State law for any disclosure made in good faith and following reasonable procedures in responding to a request for disclosure of per-sonal information under subsection (b)(1)(B)(iii) to the parent of a child.

(b) REGULATIONS.—

(1) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the Commission shall promulgate under section 553 of title 5, United States Code, regulations that—

(A) require the operator of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has actual knowledge that it is collecting personal information from a child—

(i) to provide notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practices for such information; and

(ii) to obtain verifiable parental consent for the collection, use, or disclosure of personal information from children;

(B) require the operator to provide, upon request of a parent under this subparagraph whose child has provided personal information to that website or online service, upon proper identification of that parent, to such parent—

(i) a description of the specific types of personal information collected from the child by that operator;

(ii) the opportunity at any time to refuse to permit the operator's further use or maintenance in retrievable form, or future online collection, of personal information from that child; and

(iii) notwithstanding any other provision of law, a means that is reasonable under the circumstances for the parent to obtain any personal information collected from that child;

(C) prohibit conditioning a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and

(D) require the operator of such a website or online service to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

(2) WHEN CONSENT NOT REQUIRED.—The regulations shall provide that verifiable parental consent under paragraph (1)(A)(ii) is not required in the case of—

(A) online contact information collected from a child that is used only to respond directly on a one-time basis to a specific request from the child and is not used to recontact the child and is not maintained in retrievable form by the operator;

(B) a request for the name or online contact information of a parent or child that is used for the sole purpose of obtaining parental consent or providing notice under this section and where such information is not maintained in retrievable form by the operator if parental consent is not obtained after a reasonable time;

(C) online contact information collected from a child that is used only to respond more than once directly to a specific request from the child and is not used to recontact the child beyond the scope of that request—

(i) if, before any additional response after the initial response to the child, the operator uses reasonable efforts to provide a parent notice of the online contact information collected from the child, the purposes for which it is to be used, and an opportunity for the parent to request that the operator make no further use of the information and that it not be maintained in retrievable form; or

(ii) without notice to the parent in such circumstances as the Commission may determine are appropriate, taking into consideration the benefits to the child of access to information and services, and risks to the security and privacy of the child, in regulations promulgated under this subsection;

(D) the name of the child and online contact information (to the extent reasonably necessary to protect the safety of a child participant on the site)—

(i) used only for the purpose of protecting such safety;

(ii) not used to recontact the child or for any other purpose; and

(iii) not disclosed on the site, if the operator uses reasonable efforts to provide a parent notice of the name and online contact information collected from the child, the purposes for which it is to be used, and an opportunity for the parent to request that the operator make no further use of the information and that it not be maintained in retrievable form; or

(E) the collection, use, or dissemination of such information by the operator of such a website or online service necessary—

(i) to protect the security or integrity of its website;

(ii) to take precautions against liability;

(iii) to respond to judicial process; or

(iv) to the extent permitted under other provisions of law, to provide information to law enforcement agencies or for an investigation on a matter related to public safety. 1815

(3) TERMINATION OF SERVICE.—The regulations shall permit the operator of a website or an online service to terminate service provided to a child whose parent has refused, under the regulations prescribed under paragraph (1)(B)(ii), to permit the operator's further use or maintenance in retrievable form, or future online collection, of personal information from that child.

(c) ENFORCEMENT.—Subject to sections 1304 and 1306, a violation of a regulation prescribed under subsection (a) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(d) INCONSISTENT STATE LAW.—No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this title that is inconsistent with the treatment of those activities or actions under this section.

SEC. 1304. SAFE HARBORS.

(a) GUIDELINES.—An operator may satisfy the requirements of regulations issued under section 1303(b) by following a set of self-regulatory guidelines, issued by representatives of the marketing or online industries, or by other persons, approved under subsection (b).

(b) INCENTIVES.—

(1) SELF-REGULATORY INCENTIVES.—In prescribing regulations under section 1303, the Commission shall provide incentives for self-regulation by operators to implement the protections afforded children under the regulatory requirements described in subsection (b) of that section.

(2) DEEMED COMPLIANCE.—Such incentives shall include provisions for ensuring that a person will be deemed to be in compliance with the requirements of the regulations under section 1303 if that person complies with guidelines that, after notice and comment, are approved by the Commission upon making a determination that the guidelines meet the requirements of the regulations issued under section 1303.

(3) EXPEDITED RESPONSE TO REQUESTS.—The Commission shall act upon requests for safe harbor treatment within 180 days of the filing of the request, and shall set forth in writing its conclusions with regard to such requests.

(c) APPEALS.—Final action by the Commission on a request for approval of guidelines, or the failure to act within 180 days on a request for approval of guidelines, submitted under subsection (b) may be appealed to a district court of the United States of appropriate jurisdiction as provided for in section 706 of title 5, United States Code.

SEC. 1305. ACTIONS BY STATES.

(a) IN GENERAL.—

(1) CIVIL ACTIONS.—In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by the engagement of any person in a practice that violates any regulation of the Commission prescribed under section 1303(b), the State, as parens patriae, may bring a

civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction to—

(A) enjoin that practice;

(B) enforce compliance with the regulation;

(C) obtain damage, restitution, or other compensation on behalf of residents of the State; or

(D) obtain such other relief as the court may consider to be appropriate.

(2) NOTICE.—

(A) IN GENERAL.—Before filing an action under paragraph (1), the attorney general of the State involved shall provide to the Commission—

(i) written notice of that action; and

(ii) a copy of the complaint for that action.

(B) EXEMPTION.—

(i) IN GENERAL.—Subparagraph (A) shall not apply with respect to the filing of an action by an attorney general of a State under this subsection, if the attorney general determines that it is not feasible to provide the notice described in that subparagraph before the filing of the action.

(ii) NOTIFICATION.—In an action described in clause (i), the attorney general of a State shall provide notice and a copy of the complaint to the Commission at the same time as the attorney general files the action.

(b) INTERVENTION.—

(1) IN GENERAL.—On receiving notice under subsection (a)(2), the Commission shall have the right to intervene in the action that is the subject of the notice.

(2) EFFECT OF INTERVENTION.—If the Commission intervenes in an action under subsection (a), it shall have the right—

(A) to be heard with respect to any matter that arises in that action; and

(B) to file a petition for appeal.

(3) AMICUS CURIAE.—Upon application to the court, a person whose self-regulatory guidelines have been approved by the Commission and are relied upon as a defense by any defendant to a proceeding under this section may file amicus curiae in that proceeding.

(c) CONSTRUCTION.—For purposes of bringing any civil action under subsection (a), nothing in this title shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State to—

(1) conduct investigations;

(2) administer oaths or affirmations; or

(3) compel the attendance of witnesses or the production of documentary and other evidence.

(d) ACTIONS BY THE COMMISSION.—In any case in which an action is instituted by or on behalf of the Commission for violation of any regulation prescribed under section 1303, no State may, during the pendency of that action, institute an action under subsection (a) against any defendant named in the complaint in that action for violation of that regulation.

(e) VENUE; SERVICE OF PROCESS.—

(1) VENUE.—Any action brought under subsection (a) may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

(2) SERVICE OF PROCESS.—In an action brought under subsection (a), process may be served in any district in which the defendant—

(A) is an inhabitant; or

(B) may be found.

SEC. 1306. ADMINISTRATION AND APPLICABILITY OF ACT.

(a) IN GENERAL.—Except as otherwise provided, this title shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(b) PROVISIONS.—Compliance with the requirements imposed under this title shall be enforced under—(1) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act (12 U.S.C. 601 et seq. and 611 et seq.), by the Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Direc- tors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act (12 U.S.C. 1751 et seq.) by the National Credit Union Administration Board with respect to any Federal credit union;

(4) part A of subtitle VII of title 49, United States Code, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act (7 U.S.C. 226, 227)), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.) by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association.

(c) EXERCISE OF CERTAIN POWERS.—For the purpose of the exercise by any agency referred to in subsection (a) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title, any other authority conferred on it by law.

(d) ACTIONS BY THE COMMISSION.—The Commission shall prevent any person from violating a rule of the Commission under section 1303 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this title. Any entity that violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this title.

(e) EFFECT ON OTHER LAWS.—Nothing contained in the Act shall be construed to limit the authority of the Commission under any other provisions of law.

SEC. 1307. REVIEW.

Not later than 5 years after the effective date of the regulations initially issued under section 1303, the Commission shall—

(1) review the implementation of this title, including the effect of the implementation of this title on practices relating to the collection and disclosure of information relating to children, children's ability to obtain access to information of their choice online, and on the availability of websites directed to children; and

(2) prepare and submit to Congress a report on the results of the review under paragraph (1).

SEC. 1308. EFFECTIVE DATE. Sections 1303(a), 1305, and 1306 of this title take effect on the later of—

(1) the date that is 18 months after the date of enactment of this Act; or

(2) the date on which the Commission rules on the first application filed for safe harbor treatment under section 1304 if the Commission does not rule on the first such application within one year after the date of enactment of this Act, but in no case later than the date that is 30 months after the date of enactment of this Act.

Authority: 15 U.S.C. 6501–6508.

Source: 64 FR 59911, Nov. 3, 1999, unless otherwise noted.

§ 312.1 Scope of regulations in this part.

This part implements the Children's Online Privacy Protection Act of 1998, (15 U.S.C. 6501, et seq.,) which prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet. The effective date of this part is April 21, 2000.

§ 312.2 Definitions.

Child means an individual under the age of 13.

Collects or collection means the gathering of any personal information from a child by any means, including but not limited to:

(a) Requesting that children submit personal information online;

(b) Enabling children to make personal information publicly available through a chat room, message board, or other means, *except where* the operator deletes all individually identifiable information from postings by children before they are made public, and also deletes such information from the operator's records; or

(c) The passive tracking or use of any identifying code linked to an individual, such as a cookie.

Commission means the Federal Trade Commission.

Delete means to remove personal information such that it is not maintained in retrievable form and cannot be retrieved in the normal course of business.

Disclosure means, with respect to personal information:

(a) The release of personal information collected from a child in identifiable form by an operator for any purpose, except where an operator provides such information to a person who provides support for the internal operations of the website or online service and who does not disclose or use that information for any other purpose. For purposes of this definition:

(1) *Release of personal information* means the sharing, selling, renting, or any other means of providing personal information to any third party, and

(2) *Support for the internal operations of the website or online service* means those activities necessary to maintain the technical functioning of the website or online service, or to fulfill a request of a child as permitted by §312.5(c)(2) and (3); or

(b) Making personal information collected from a child by an operator publicly available in identifiable form, by any means, including by a public posting through the Internet, or

through a personal home page posted on a website or online service; a pen pal service; an electronic mail service; a message board; or a chat room.

Federal agency means an agency, as that term is defined in Section 551(1) of title 5, United States Code.

Internet means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire, radio, or other methods of transmission.

Online contact information means an e-mail address or any other substantially similar identifier that permits direct contact with a person online.

Operator means any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, involving commerce:

(a) Among the several States or with 1 or more foreign nations;

(b) In any territory of the United States or in the District of Columbia, or between any such territory and

(1) Another such territory, or

(2) Any State or foreign nation; or

(c) Between the District of Columbia and any State, territory, or foreign nation. This definition does not include any nonprofit entity that would otherwise be exempt from coverage under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Parent includes a legal guardian.

Person means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

Personal information means individually identifiable information about an individual collected online, including:

(a) A first and last name;

(b) A home or other physical address including street name and name of a city or town;

(c) An e-mail address or other online contact information, including but not limited to an instant messaging user identifier, or a screen name that reveals an individual's e-mail address;

(d) A telephone number;

(e) A Social Security number;

(f) A persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information; or a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting; or

(g) Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition.

Third party means any person who is not:

(a) An operator with respect to the collection or maintenance of personal information on the website or online service; or

(b) A person who provides support for the internal operations of the website or online service and who does not use or disclose information protected under this part for any other purpose.

Obtaining *verifiable consent* means making any reasonable effort (taking into consideration available technology) to ensure that before personal information is collected from a child, a parent of the child:

(a) Receives notice of the operator's personal information collection, use, and disclosure practices; and

(b) Authorizes any collection, use, and/or disclosure of the personal information.

Website or online service directed to children means a commercial website or online service, or portion thereof, that is targeted to children. *Provided, however,* that a commercial website or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link. In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities and incentives.

§ 312.3 Regulation of unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.

General requirements. It shall be unlawful for any operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting or

maintaining personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under this part. Generally, under this part, an operator must:

(a) Provide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information (§312.4(b));

(b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children (§312.5);

(c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance (§312.6);

(d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity (§312.7); and

(e) Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children (§312.8).

§ 312.4 Notice.

(a) *General principles of notice.* All notices under §§312.3(a) and 312.5 must be clearly and understandably written, be complete, and must contain no unrelated, confusing, or contradictory materials.

(b) *Notice on the website or online service.* Under §312.3(a), an operator of a website or online service directed to children must post a link to a notice of its information practices with regard to children on the home page of its website or online service and at each area on the website or online service where personal information is collected from children. An operator of a general audience website or online service that has a separate children's area or site must post a link to a notice of its information practices with regard to children on the home page of the children's area.

(1) *Placement of the notice.* (i) The link to the notice must be clearly labeled as a notice of the website or online service's information practices with regard to children;

(ii) The link to the notice must be placed in a clear and prominent place and manner on the home page of the website or online service; and

(iii) The link to the notice must be placed in a clear and prominent place and manner at each area on the website or online service where children directly provide, or are asked to provide, personal information, and in close proximity to the requests for information in each such area.

(2) *Content of the notice.* To be complete, the notice of the website or online service's information practices must state the following:

(i) The name, address, telephone number, and e-mail address of all operators collecting or maintaining personal information from children through the website or online service. *Provided that:* the operators of a website or online service may list the name, address, phone number, and e-mail address of one operator who will respond to all inquiries from parents concerning the operators' privacy policies and use of children's information, as long as the names of all the operators collecting or maintaining personal information from children through the website or online service are also listed in the notice;

(ii) The types of personal information collected from children and whether the personal information is collected directly or passively;

(iii) How such personal information is or may be used by the operator(s), including but not limited to fulfillment of a requested transaction, recordkeeping, marketing back to the child, or making it publicly available through a chat room or by other means;

(iv) Whether personal information is disclosed to third parties, and if so, the types of business in which such third parties are engaged, and the general purposes for which such information is used; whether those third parties have agreed to maintain the confidentiality, security, and integrity of the personal information they obtain from the operator; and that the parent has the option to consent to the collection and use of their child's personal information without consenting to the disclosure of that information to third parties;

(v) That the operator is prohibited from conditioning a child's participation in an activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity; and

(vi) That the parent can review and have deleted the child's personal information, and refuse to permit further collection or use of the child's information, and state the procedures for doing so.

(c) *Notice to a parent.* Under §312.5, an operator must make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives notice of the operator's practices with regard to the collection, use, and/or disclosure of the child's personal information, including notice of any material change in the collection, use, and/or disclosure practices to which the parent has previously consented.

(1) *Content of the notice to the parent.* (i) All notices must state the following:

(A) That the operator wishes to collect personal information from the child;

(B) The information set forth in paragraph (b) of this section.

(ii) In the case of a notice to obtain verifiable parental consent under §312.5(a), the notice must also state that the parent's consent is required for the collection, use, and/or disclosure of such information, and state the means by which the parent can provide verifiable consent to the collection of information.

(iii) In the case of a notice under the exception in §312.5(c)(3), the notice must also state the following:

(A) That the operator has collected the child's e-mail address or other online contact information to respond to the child's request for information and that the requested information will require more than one contact with the child;

(B) That the parent may refuse to permit further contact with the child and require the deletion of the information, and how the parent can do so; and

(C) That if the parent fails to respond to the notice, the operator may use the information for the purpose(s) stated in the notice.

(iv) In the case of a notice under the exception in §312.5(c)(4), the notice must also state the following:

(A) That the operator has collected the child's name and e-mail address or other online contact information to protect the safety of the child participating on the website or online service;

(B) That the parent may refuse to permit the use of the information and require the deletion of the information, and how the parent can do so; and

(C) That if the parent fails to respond to the notice, the operator may use the information for the purpose stated in the notice.

§ 312.5 Parental consent.

(a) *General requirements.* (1) An operator is required to obtain verifiable parental consent before any collection, use, and/or disclosure of personal information from children, including consent to any material change in the collection, use, and/or disclosure practices to which the parent has previously consented.

(2) An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties.

(b) *Mechanisms for verifiable parental consent.* (1) An operator must make reasonable efforts to obtain verifiable parental consent, taking into consideration available technology. Any method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent.

(2) Methods to obtain verifiable parental consent that satisfy the requirements of this paragraph include: providing a consent form to be signed by the parent and returned to the operator by postal mail or facsimile; requiring a parent to use a credit card in connection with a transaction; having a parent call a toll-free telephone number staffed by trained personnel; using a digital certificate that uses public key technology; and using e-mail accompanied by a PIN or password obtained through one of the verification

methods listed in this paragraph. *Provided that:* Until the Commission otherwise determines, methods to obtain verifiable parental consent for uses of information other than the "disclosures" defined by §312.2 may also include use of e-mail coupled with additional steps to provide assurances that the person providing the consent is the parent. Such additional steps include: sending a confirmatory e-mail to the parent following receipt of consent; or obtaining a postal address or telephone number from the parent and confirming the parent's consent by letter or telephone call. Operators who use such methods must provide notice that the parent can revoke any consent given in response to the earlier e-mail.

(c) *Exceptions to prior parental consent.* Verifiable parental consent is required prior to any collection, use and/or disclosure of personal information from a child except as set forth in this paragraph. The exceptions to prior parental consent are as follows:

(1) Where the operator collects the name or online contact information of a parent or child to be used for the sole purpose of obtaining parental consent or providing notice under §312.4. If the operator has not obtained parental consent after a reasonable time from the date of the information collection, the operator must delete such information from its records;

(2) Where the operator collects online contact information from a child for the sole purpose of responding directly on a one-time basis to a specific request from the child, and where such information is not used to recontact the child and is deleted by the operator from its records;

(3) Where the operator collects online contact information from a child to be used to respond directly more than once to a specific request from the child, and where such information is not used for any other purpose. In such cases, the operator must make reasonable efforts, taking into consideration available technology, to ensure that a parent receives notice and has the opportunity to request that the operator make no further use of the information, as described in §312.4(c), immediately after the initial response and before making any additional response to the child. Mechanisms to provide such notice include, but are not limited to, sending the notice by postal mail or sending the notice to the parent's e-mail address, but do not include asking a child to print a notice form or sending an e-mail to the child;

(4) Where the operator collects a child's name and online contact information to the extent reasonably necessary to protect the safety of a child participant on the website or online service, and the operator uses reasonable efforts to provide a parent notice as described in §312.4(c), where such information is:

(i) Used for the sole purpose of protecting the child's safety;

(ii) Not used to recontact the child or for any other purpose;

(iii) Not disclosed on the website or online service; and

(5) Where the operator collects a child's name and online contact information and such information is not used for any other purpose, to the extent reasonably necessary:

(i) To protect the security or integrity of its website or online service;

(ii) To take precautions against liability;

(iii) To respond to judicial process; or

(iv) To the extent permitted under other provisions of law, to provide information to law enforcement agencies or for an investigation on a matter related to public safety.

[64 FR 59911, Nov. 3, 1999, as amended at 67 FR 18821, Apr. 17, 2002; 70 FR 21106, Apr. 22, 2005]

§ 312.6 Right of parent to review personal information provided by a child.

(a) Upon request of a parent whose child has provided personal information to a website or online service, the operator of that website or online service is required to provide to that parent the following:

(1) A description of the specific types or categories of personal information collected from children by the operator, such as name, address, telephone number, e-mail address, hobbies, and extracurricular activities;

(2) The opportunity at any time to refuse to permit the operator's further use or future online collection of personal information from that child, and to direct the operator to delete the child's personal information; and

(3) Notwithstanding any other provision of law, a means of reviewing any personal information collected from the child. The means employed by the operator to carry out this provision must:

(i) Ensure that the requestor is a parent of that child, taking into account available technology; and

(ii) Not be unduly burdensome to the parent.

(b) Neither an operator nor the operator's agent shall be held liable under any Federal or State law for any disclosure made in good faith and following reasonable procedures in responding to a request for disclosure of personal information under this section.

(c) Subject to the limitations set forth in §312.7, an operator may terminate any service provided to a child whose parent has refused, under paragraph (a)(2) of this section, to permit the operator's further use or collection of personal information from his or her child or has directed the operator to delete the child's personal information.

§ 312.7 Prohibition against conditioning a child's participation on collection of personal information.

An operator is prohibited from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity.

§ 312.8 Confidentiality, security, and integrity of personal information collected from children.

The operator must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

§ 312.9 Enforcement.

Subject to sections 6503 and 6505 of the Children's Online Privacy Protection Act of 1998, a violation of a regulation prescribed under section 6502 (a) of this Act shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

§ 312.10 Safe harbors.

(a) *In general.* An operator will be deemed to be in compliance with the requirements of this part if that operator complies with self-regulatory guidelines, issued by representatives of the marketing or online industries, or by other persons, that, after notice and comment, are approved by the Commission.

(b) *Criteria for approval of self-regulatory guidelines.* To be approved by the Commission, guidelines must include the following:

(1) A requirement that operators subject to the guidelines ("subject operators") implement substantially similar requirements that provide the same or greater protections for children as those contained in §§312.2 through 312.9;

(2) An effective, mandatory mechanism for the independent assessment of subject operators' compliance with the guidelines. This performance standard may be satisfied by:

(i) Periodic reviews of subject operators' information practices conducted on a random basis either by the industry group promulgating the guidelines or by an independent entity;

(ii) Periodic reviews of all subject operators' information practices, conducted either by the industry group promulgating the guidelines or by an independent entity;

(iii) Seeding of subject operators' databases, if accompanied by either paragraphs (b)(2)(i) or (b)(2)(ii) of this section; or

(iv) Any other equally effective independent assessment mechanism; and

(3) Effective incentives for subject operators' compliance with the guidelines. This performance standard may be satisfied by:

(i) Mandatory, public reporting of disciplinary action taken against subject operators by the industry group promulgating the guidelines;

(ii) Consumer redress;

(iii) Voluntary payments to the United States Treasury in connection with an industry-directed program for violators of the guidelines;

(iv) Referral to the Commission of operators who engage in a pattern or practice of violating the guidelines; or

(v) Any other equally effective incentive.

(4) The assessment mechanism required under paragraph (b)(2) of this section can be provided by an independent enforcement program, such as a seal program. In considering whether to initiate an investigation or to bring an enforcement action for violations of this part, and in considering appropriate remedies for such violations, the Commission will take into account whether an operator has been subject to self-regulatory guidelines approved under this section and whether the operator has taken remedial action pursuant to such guidelines, including but not limited to actions set forth in paragraphs (b)(3)(i) through (iii) of this section.

(c) *Request for Commission approval of self-regulatory guidelines.* (1) To obtain Commission approval of self-regulatory guidelines, industry groups or other persons must file a request for such approval. A request shall be accompanied by the following:

(i) A copy of the full text of the guidelines for which approval is sought and any accompanying commentary;

(ii) A comparison of each provision of §§312.3 through 312.8 with the corresponding provisions of the guidelines; and

(iii) A statement explaining:

(A) How the guidelines, including the applicable assessment mechanism, meet the requirements of this part; and

(B) How the assessment mechanism and compliance incentives required under paragraphs (b)(2) and (3) of this section provide effective enforcement of the requirements of this part.

(2) The Commission shall act upon a request under this section within 180 days of the filing of such request and shall set forth its conclusions in writing.

(3) Industry groups or other persons whose guidelines have been approved by the Commission must submit proposed changes in those guidelines for review and approval by the Commission in the manner required for initial approval of guidelines under

paragraph (c)(1). The statement required under paragraph (c)(1)(iii) must describe how the proposed changes affect existing provisions of the guidelines.

(d) *Records.* Industry groups or other persons who seek safe harbor treatment by compliance with guidelines that have been approved under this part shall maintain for a period not less than three years and upon request make available to the Commission for inspection and copying:

(1) Consumer complaints alleging violations of the guidelines by subject operators;

(2) Records of disciplinary actions taken against subject operators; and

(3) Results of the independent assessments of subject operators' compliance required under paragraph (b)(2) of this section.

(e) *Revocation of approval.* The Commission reserves the right to revoke any approval granted under this section if at any time it determines that the approved self-regulatory guidelines and their implementation do not, in fact, meet the requirements of this part.

§ 312.11 Rulemaking review.

No later than April 21, 2005, the Commission shall initiate a rulemaking review proceeding to evaluate the implementation of this part, including the effect of the implementation of this part on practices relating to the collection and disclosure of information relating to children, children's ability to obtain access to information of their choice online, and on the availability of websites directed to children; and report to Congress on the results of this review.

§ 312.12 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.